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Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

MILWAUKEE COUNTY PAVERS ASSOCIATION, INC., *et al.*,
Petitioners,

v.

RONALD R. FIEDLER and DAVID MANNING,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents the following questions of federal law regarding the application of the Fourteenth Amendment to state action under a race based program adopted by Congress.

1. Does the strict scrutiny standard of review adopted by the Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) apply to state action in administering a race based program adopted by Congress? If so, does the state's receipt of funds under such a program constitute a compelling state interest under the *Croson* standard?

2. Is state action in administering a race based federal program *per se* narrowly tailored where the state action facially complies with the regulations adopted by the federal agency responsible for administering the program?

3. Can a Fourteenth Amendment challenge to voluntary state action in administering a race based program enacted by Congress be maintained where the act of Congress which created the program and the regulations adopted to implement the program are conceded to be facially constitutional?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to this proceeding below were: (a) the petitioners Milwaukee County Pavers Assoc., a Wisconsin corporation, B.R. Amon & Sons, Inc., a Wisconsin corporation, Barricade Flasher Service, Inc., a Wisconsin corporation, Boulanger Const. Co., Inc., a Wisconsin corporation, Brinkmann Engineering, Inc., a Wisconsin corporation, James Cape & Sons Co., a Wisconsin corporation, Century Fence, a Wisconsin corporation, Earth, Inc., a Wisconsin corporation, Hanz Contractors, Inc., a Wisconsin corporation, Johnson Sand & Gravel, Inc., a Wisconsin corporation, Tom Kuehne Landscape Contractor, Inc., a Wisconsin corporation, La Londe Contractors, Inc., a Wisconsin corporation, Milwaukee General Construction Co., a Wisconsin corporation, A.W. Oakes, a Wisconsin corporation, Pac-Sac Construction, Inc., a Wisconsin corporation, Paving Mix & Construction Co., Inc., a Wisconsin corporation, Pheifer Bros. Const. Co., Inc., a Wisconsin corporation, Reliance Construction Co., Inc., a Wisconsin corporation, Rock Road Of Wisconsin, Inc., a Wisconsin corporation, Stoehr Grading Co., Inc., a Wisconsin corporation, Super Excavators, Inc., a Wisconsin corporation, Trierweiler Const. & Supply Co., Inc., a Wisconsin corporation, Vinton Construction Co., a Wisconsin corporation, Zignego Company, a Wisconsin corporation, and (b) the respondents Ronald R. Fiedler, individually and in his capacity as Secretary of the Wisconsin Department of Transportation, and David Manning, individually and in his capacity as the Department's Minority Business Programs Director.

Petitioners have no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

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PETITION FOR A WRIT OF CERTIORARI

Milwaukee County Pavers Association and others petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 15, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 922 F.2d 419, and is reprinted in the appendix ("App.") to this petition. App., pp. 1a-10a.

The United States District Court for the Western District of Wisconsin issued three decisions regarding the

issues raised by this petition. These decisions are reported at 731 F. Supp. 1395, 710 F. Supp. 1532 and 707 F. Supp. 1016 and are reprinted in the appendix in reverse chronological order. App., pp. 13a-53a, 54a-93a and 94a-130a.

JURISDICTION

The petitioners' complaint and first amended complaint invoked federal jurisdiction under 42 U.S.C. § 1983.

The Court of Appeals for the Seventh Circuit entered its judgment on January 15, 1991. This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1). This petition has been timely filed in accordance with Rule 13 of the Rules of this Court.

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. XIV.

> Section 1. . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * *
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

FEDERAL STATUTES INVOLVED

Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 100 Stat. 145 states:

> Except to the extent that the Secretary determines otherwise, not less than 10% of the amounts authorized to be appropriated under Titles I and III of this Act or obligated under Titles I, II and III (other than section 203) of the Surface Transportation Assistance Act of 1982 after the date of the enactment of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

FEDERAL REGULATIONS INVOLVED

The federal regulations adopted by the U.S. Department of Transportation to implement § 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 are found at 49 C.F.R. Part 23 and relevant portions are set forth in the appendix. App., pp. 133a-206a.

STATE STATUTES INVOLVED

Section 84.076, Wis. Stats. (1989) states in part:

> Disadvantaged business demonstration and training program. (1) Definitions. In this section:
>
> > (a) "Disadvantaged individual" means a minority group member, a woman or any other individual found to be socially and economically disadvantaged by the department as provided in 49 C.F.R. 23.62, unless successfully challenged as provided in 49 C.F.R. 23.69.

Section 84.076, Wis. Stats (1989) is set forth in its entirety in the appendix. App., pp. 207a-209a.

STATEMENT UNDER RULE 29.4(b)

Since the proceeding draws into question the constitutionality of Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 100 Stat. 145, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

No court of the United States as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

STATEMENT OF THE CASE

Nature Of The Case. The petitioners (hereinafter "the contractors") are highway contractors and an association of highway contractors who routinely bid on and perform work on highway construction projects awarded by the Wisconsin Department of Transportation (WDOT). The respondents (hereinafter "Wisconsin", "WDOT" or "the state") are the Secretary of WDOT and the director of the WDOT Minority Business Programs. Respondents Fiedler and Manning are primarily responsible for the administration of the WDOT disadvantaged business enterprise (hereinafter "DBE") programs. The programs are based on racial presumptions of disadvantage which Judge Posner found to be "a form of racial discrimination". App., pp. 2a-3a. The contractors challenged the application of the DBE programs on the grounds that the programs denied them equal protection under the Fourteenth Amendment of the United States Constitution by allocating government contracts on the basis of race, where no compelling governmental interest had been shown and the programs were not narrowly tailored to accomplish a remedial objective. The action was brought under 42 U.S.C. § 1983. No jurisdictional issues have been raised at any point in the case regarding the claims at issue in this petition.

This petition brings before the Court the issue of whether state action in administering a race based program is subject to different levels of scrutiny depending on whether the race based program is a creature of the state or part of a voluntary federal program administered by the state. This issue has the potential to arise in every instance in which a state or local government undertakes to administer a race based program as a condition to the receipt of federal funds. A resolution of this issue will better define citizens' rights under the Fourteenth Amendment and will define the circumstances, if

any, under which a state is relieved from its obligations under the Fourteenth Amendment.

In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Court held that a local or state race based remedial program is subject to strict scrutiny. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Court, without a majority agreeing as to the proper standard of review, found a race based program adopted by Congress to be facially constitutional. The federal program before the Court is similar in most respects to the program before the Court in *Fullilove*. The Court in *Fullilove* did not decide what level of scrutiny is to be applied to state action in administering a Congressionally authorized race based program, specifically deferring this question to a later time.

Statement Of Facts. The facts in this case are not in dispute. Wisconsin administers the race based DBE program in two contexts.

First, the DBE program was used to set subcontracting goals on highway projects funded primarily with state funds. The state stopped this practice after the district court issued a preliminary injunction. Under this program, contractors were required to award a portion of the contract to certified DBEs or seek a good faith waiver of the goal. No findings of past discrimination had been made to show a compelling governmental interest for a race based program. The state did not intend the program to be a means of remedying past discrimination. The courts below held this part of the DBE program to be unconstitutional under the standards set forth in *City of Richmond v. J.A. Croson*, 448 U.S. 469 (1989) and enjoined any further state action. App., pp. 2a-4a, 9a.

Second, the WDOT program is applied to contracts for highway projects awarded by the WDOT which are funded in part by federal funds under the Surface Transportation and Uniform Relocation Assistance Act of 1987,

Pub. L. No. 100-17, 100 Stat. 145 (1987) (hereinafter "STURAA"). Participation in the federal program is voluntary. Under the applicable regulations (49 C.F.R. Part 23), a state has the discretion to set DBE goals at 10 percent of the contract dollars or higher, or to seek a waiver of the 10 percent goal set forth in § 106(c) of STURAA. 49 C.F.R. §§ 23.64-23.66, App. D. A waiver will be granted if the state is making all appropriate efforts to increase participation of disadvantaged businesses and the goal proposed by the state represents a reasonable expectation of participation. 49 C.F.R. § 23.66 (b). Wisconsin did not consider seeking a waiver in 1988 or 1989. Wisconsin exceeded the ten percent level in 1987 and 1988. App., p. 21a.

The federal regulations presume that the following groups are socially and economically disadvantaged: (1) women, (2) Black Americans, (3) Hispanic Americans, (4) Native Americans, (5) Asian-Pacific Americans and (6) Asian-Indian Americans. 49 C.F.R. § 23.62. A third party or the state can challenge the presumption of disadvantage. 49 C.F.R. § 23.69; 49 C.F.R. Pt. 23, Subpt. D, App. C. To rebut the presumption of social disadvantage, a party must show that the individual "has not held himself or herself out to be a member of one of the groups, has not acted as a member of one of the groups, has not acted as a member of a community of disadvantaged persons and would not be identified by persons in the population at large as belonging to the disadvantaged group". *Id.*

On federally funded projects, the WDOT program includes DBE subcontracting goals and a DBE prime set aside. The state has chosen the option of setting a goal of awarding to DBE contractors at least 10% of the funds awarded on projects funded under STURAA. Actual DBE participation exceeded 10% in 1987 and 1988. App., pp. 21a, 59a, 71a, 78a. The state does not set the goal with any remedial purpose in mind or relate the goal to the

existence of the effects of identified discrimination, if any, in Wisconsin.

The state has denied certification to only two applicants who are members of a presumptively disadvantaged group on the grounds that the applicants were not disadvantaged economically in fact. These two applicants were wealthy professional athletes. App., p. 23a. No applicant who is a member of a presumptively disadvantaged group has been denied certification on the grounds that the applicant is not "socially disadvantaged".

The state has made no findings of discrimination in the Wisconsin highway construction industry or otherwise. App., p. 46a. The effects of past discrimination, if any, are not considered by the state in setting of DBE goals or in any other part of the program. App., p. 27a. The state concedes that it does not administer the DBE program in a manner intended to remedy the effects of prior discrimination. App., p. 2a.

The Seventh Circuit held that state action in administering the voluntary race based program which facially complied with the statute and regulations was subject to no further review. "Insofar as the state is merely doing what the statute and regulations envisage and permit, the attack on the state is an impermissible collateral attack on the statute and regulations." App., pp. 6a-7a. The courts below held that the program was unconstitutional where it exceeded the scope of the federal regulations. App., pp. 9a, 44a-45a, 49a.

Procedural History. The contractors' original complaint sought injunctive relief to stop the awarding of contracts under the WDOT DBE Demonstration Program (§ 84.076, Wis. Stats.) administered by the WDOT. App., pp. 207a-209a. The district court entered an order and decision on February 27, 1989 enjoining the state from awarding contracts under the DBE Demonstration Program. (*Pavers I*) App., pp. 94a-130a.

The state asked the court to reconsider its order and decision on the grounds that the projects were funded primarily by federal funds subject to the provisions of § 106(c) of STURAA and 49 C.F.R. Part 23. On April 7, 1989, the district court entered a decision and order modifying the injunction by limiting its application to projects funded solely with state funds. (*Pavers II*) App., pp. 54a-93a. In *Pavers II*, the district court found that "the findings supporting the federal act . . . provide a constitutionally sufficient foundation for the challenged Wisconsin law." App., pp. 81a-82a, n. 8. The district court made no determination that any effects of discrimination exist in the Wisconsin highway construction industry.

The contractors' amended complaint alleged additional state and federal claims. As to the DBE program on federal projects, the contractors alleged that the act and regulations were unconstitutional as applied by the state. As a defense to the federal claims, the state's answer alleged that the contractors had failed to name the federal government as a indispensable party under Rule 19 Fed. R. Civ. P. As a defense to the state law claims, the state's answer alleged that the claims were barred by the Eleventh Amendment, U.S. Constitution.

The parties filed cross motions for summary judgment in the fall of 1989. On March 6, 1990, the district court entered an order permanently enjoining the state from administering the DBE program on projects funded exclusively by the state, setting DBE subcontractor goals on federally funded projects awarded to DBE prime contrators, and setting any DBE goals past the date that the DBE program is authorized by STURAA. (*Pavers III*) App., pp. 13a-53a. The district court dismissed the contractors' claims as to the remainder of the DBE program on federally funded projects and dismissed the contractors' state law claims for lack of jurisdiction under the Eleventh Amendment. App., pp. 36a-52a.

In *Pavers III*, the district court acknowledged that the contractors' position had "textual support" and that the Court in *Fullilove* "makes repeated reference to whether the program is tailored to remedy only the effects of prior discrimination". The district court held, however, that "(d)espite the clear emphasis in *Fullilove* on remedying prior discrimination, it would be inconsistent with the reasoning of the overall opinion" to require states to make findings of past discrimination in order to narrowly tailor the administration of the program. App. pp. 39a-41a.

The district court also denied the respondents' motion to dismiss for failure to name an indispensable party under Rule 19, Fed. R. Civ. P. The state had argued that the federal government was an indispensable party. App., pp. 33a-34a.

Notices of appeal were timely filed with the United States Court of Appeals for the Seventh Circuit. The contractors sought reversal of the district court's order dismissing their claim to enjoin the state's administration of the DBE program on federally funded projects. The state sought reversal of the district court's order enjoining the administration of the DBE program on state funded projects and certain aspects of the DBE program on federally funded projects. The state did not appeal the district court's order denying their motion to dismiss for failing to name the federal government under Rule 19 Fed. R. Civ. P.

In a decision entered on January 15, 1991, the Court of Appeals for the Seventh Circuit affirmed the district court decision in its entirety. App., pp. 1a-12a. With respect to the DBE program on state funded projects, the court of appeals held that the program was unconstitutional under the standards set forth in *Croson*. With respect to the DBE program on federally funded projects, the court of appeals also applied the *Croson* standard to those parts of the program which exceeded the scope of

the state's authority under the federal act and regulations and held that those parts of the program were unconstitutional. App., p. 9a.

The court of appeals held that the state's administration of the remaining parts of the DBE program on federally funded projects was constitutional because it complied with the federal regulations and statute which the contractors conceded are facially constitutional. The court stated that "[i]nsofar as the state is merely complying with federal law, it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations." App., pp. 6a-7a. While stating that the law is unconstitutional if the remedial objective of the DBE program which makes the program constitutional on its face is a "fiction" when it is applied to Wisconsin, the court of appeals nevertheless held that state action which facially complies with the law and regulations is subject to no further review. App., pp. 8a-9a. Therefore, the contractors are left with no avenue to challenge state action which facially complies with the program regulations, but which does not satisfy the standards set forth in *Croson*.

REASONS FOR GRANTING THE WRIT

I. STATE ADMINISTERED RACIAL SET-ASIDES HAVING NO REMEDIAL PURPOSE CANNOT ESCAPE CONSTITUTIONAL SCRUTINY WHERE CONGRESS HAS NOT COMPELLED SUCH STATE ACTION.

The Seventh Circuit Court of Appeals ruled, quite correctly in light of this Court's precedent in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), that the state funded Wisconsin DBE program—by affording to some individuals, because of race or ethnic background, a presumptive preference unavailable to others in awarding its highway contracts and subcontracts—violated con-

stitutional etiquette. App., p. 9a. Yet, Wisconsin's use of the identical presumptive preference to set aside highway contracts and subcontracts for minorities under a separate federally funded program was held to be beyond constitutional reproach in the absence of a facial attack on the federal funding statute. This latter ruling is fundamentally wrong, cannot be squared with this Court's prior decisions, and demands plenary review.

This Court made abundantly clear in *Croson* that state administered set aside programs favoring certain contractors or subcontractors because of race fail constitutionally. While dictum in *Croson* suggested that some greater degree of latitude might be recognized judicially if Congress directed such state action, it cannot be read to allow a state the unfettered discretion to adopt and administer a race based program with no regard to the remedial purpose which justified Congress' exercise of its authority under Section 5 of the Fourteenth Amendment in the first instance.[1] *Croson*, 488 U.S. at 487-489. Yet that is the Seventh Circuit's conclusion.

Justice O'Connor's majority opinion in *Croson* is instructive. Its reference point, not surprisingly, is *Fullilove*. In upholding by plurality vote in that case Congress' 10% minority set aside program against a facial attack, Justice O'Connor noted (*id.* at 487) that emphasis was placed on the remedial purpose that compelled legislative resort to a racial preference in order to counter what Congress regarded as extensive nationwide discrimination in public works' contracting activity. See *Fullilove*, *su-*

[1] The contractors have, for purposes of this litigation, conceded that Congress intended the program to be remedial and, therefore, may be a facially constitutional exercise of its authority under Section 5 of the Fourteenth Amendment as outlined in *Fullilove*. Logically, therefore, any action to carry out the program, at a minimum, must be remedial to survive scrutiny. If, as the state concedes and the Seventh Circuit recognized, the administration is not remedial, the shelter from scrutiny, if any, flowing from Congress' exercise of its authority under Section 5 is lost.

pra, 448 U.S. at 486-487. The respect for that congressional judgment was influenced in no small part, at least in the view of three of the Justices, by the fact that the legislative scheme contemplated that the beneficiaries of the 10% set aside would only be those contractors who could demonstrate to the administering agency that they had indeed been victims of racial discrimination.

Petitioners do not seek here to have *Fullilove* reconsidered. We urge, instead, that it not be extended. Whatever umbrella of protection state set aside programs might claim under *Fullilove* where Congress legislates the use of racial preferences for remedial purposes, nothing in this Court's prior decisions suggests that, without such congressional directive, states can escape the *Croson* holding by facially complying with the broad framework set up by Congress without regard to its remedial purpose.[2] The Seventh Circuit's contrary decision is in error and cannot be allowed to stand.

It is no answer, we submit, to point to the regulatory scheme under STURAA that has been fashioned by the

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[2] No mention was made below of this Court's recent decisions in *FCC v. Metro Broadcasting* and *Astroline Communications v. Shurberg Broadcasting*, 497 U.S. ——, 110 S. Ct. 2997 (1990). While the relevance of these cases here is admittedly somewhat attenuated, a marginal reference is in order. In *Metro Broadcasting* and *Shurberg*, the Court upheld two minority preference programs in the awarding of television licenses, both found by the majority to be congressionally mandated. While neither program was enacted for remedial reasons, both were found to have been fashioned by Congress for "a benign purpose" (i.e. to diversify television programming), which, the majority held (*id.* at 3010), was in rare circumstances also entitled to considerable judicial deference. Since the federal statute involved here, STURAA, does not mandate that racial preferences be a feature of the participating state DBE programs, the discussion that might arise from *Metro Broadcasting* and *Shurberg*, as to what other sorts of set aside programs might appropriately fit within the non-remedial-but-"benign"-congressional-purpose category so as to command similar judicial respect, is quite beside the point here.

Executive Branch. Nothing in *Croson* even hints that the special deference to which congressional action is entitled somehow spills over to the federal bureaucracy and attaches to the multitude of civil servants who draft and constantly tinker with the regulatory landscape. Nor is there any hint that the Court should give any deference to a state's discretionary actions in adopting a federal program, particularly where such actions are *not* driven by any remedial consideration. *See* App., p. 2a.

Contractors made no facial constitutional assault on the statute and its regulatory scheme because they can also be applied constitutionally. Nowhere does STURAA or the regulations compel use by the states of a preferential presumption; at most, they simply *permit it*. Accordingly, states could theoretically reach or exceed the 10% DBE goal through selection, for example, of all the minority and nonminority owned business enterprises that applied to work on a given project—without resort to any presumption. Moreover, the regulations themselves provide explicitly that states unable to reach the 10% DBE goal may apply for a waiver. *See* 49 C.F.R. §§ 23.54-23.66, App. D. This waiver provision is itself sufficient to save the statutory scheme from facial constitutional condemnation, since it leaves open the door to excuse states from the 10% goal if there is no constitutionally acceptable means of compliance.[3]

Thus, neither STURAA nor its implementing regulations require the states seeking highway grants to act unconstitutionally. Indeed, in order to square the regulations with the statute, the only reasonable interpreta-

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[3] Whether the federal regulations, on an application of the waiver provisions, would indeed excuse a state from the 10% goal on a showing that it was constitutionally unattainable, need not be answered in the context of a facial review of the regulations. It is enough that the regulations leave open that possibility. See *Fullilove*, *supra*, 448 U.S. at 490.

tion to be placed upon them is that states who wish to participate in the DOT program must strive to meet the 10% DBE goal by every means constitutionally available and, failing that, should seek a waiver from the federal government.

This leaves no more reason for states to operate unconstitutionally under STURAA and its implementing regulations than they are permitted to do under their own identical state funded construction programs. If, as is uncontested here, Wisconsin utilizes a racial presumption to favor certain businesses—leaving other businesses outside the contracting process because of race—it has no federal directive (either statutory or regulatory) to hide behind.[4] At most, it can argue that its preferential selection practices are permitted (but not required) by the regulatory regime. But the fact that Congress or the

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[4] Nor has the state offered any compelling reason for its use of the racial presumption. See, e.g., *Croson*, *supra*, 448 U.S. at 497. There are, for example, no state findings of statewide discrimination in connection with contracting activity in the highway construction industry. See App., pp. 1-3. The preference is thus not tied to any remedial purpose. See, e.g., *id.*; and see *Fullilove*, *supra*, 448 U.S. at 452-453 (Stevens, J., dissenting).

At most, the state seems to be arguing that its desire to receive federal grant money justifies employing racial set asides. But such an interest in federal funds hardly articulates a sufficiently compelling reason for states to classify by race (even assuming *arguendo* that such unconstitutional behavior was indeed a condition precedent to receiving DOT grant money). Moreover, in the present situation, states are not confronted with a "Hobson choice". To the contrary, they can participate in the federally funded highway program and, at least through the waiver procedure, avoid the constitutional dilemma. The fact that Wisconsin never chose the waiver procedure makes its argument no more attractive. Classifying by race demands a more compelling justification than the mere convenience of electing voluntarily the perhaps more trodden unconstitutional path of preferential presumptions, rather than striking out on the less worn but readily accessible constitutional path opened to the states by federal waiver procedures.

Executive Branch may arguably *permit* a state to pursue an unconstitutional course, while at the same time making available to the state an alternative approach that allows it to comport fully with the constitution, is no excuse for condoning a turn in the wrong direction.

The error below is in allowing a broad federal regulatory scheme to shield unconstitutional state action that is not compelled by executive or congressional action. This Court's decisions in *Croson* and *Fullilove* are seriously misapplied to reach such a result. Plenary review is therefore imperative.

II. THE COURT SHOULD REMOVE ANY DOUBT THAT STRICT SCRUTINY IS THE PROPER STANDARD TO APPLY UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO STATE ACTION IN ADMINISTERING A RACE BASED PROGRAM ADOPTED BY CONGRESS, THUS FOLLOWING THE COURT'S HOLDINGS IN *WYGANT* AND *CROSON*.

In *Croson*, a majority of the Court held that a race based program adopted by a state or local government is subject to strict scrutiny requiring that a compelling governmental interest exist for the use of race and that the program be narrowly tailored to achieve the remedial purpose and nothing more. *Croson*, 488 U.S. at 493-498. This standard was properly applied by the courts below to the WDOT DBE program on state funded projects and to those parts of the WDOT DBE program on federal projects which exceeded the authority granted by the act and the regulations. App., p. 9a. See also, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). This standard was ignored with respect to state action under Sec. 106(c) of STURAA.

In *Fullilove*, a majority of the Court did not agree on the level of scrutiny to apply to a race based remedial

program adopted by Congress. In a plurality opinion authored by Chief Justice Burger, the Court appears to apply a heightened or stringent scrutiny standard and found the program at issue to be facially constitutional under this standard. 448 U.S. at 453-492 (J. Powell conc., 448 U.S. at 495-517). In a concurring opinion authored by Justice Marshall, the standard "is whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives," holding that the program was facially constitutional under this standard. 448 U.S. at 519. A dissenting opinion by Justice Stewart, joined by Justice Rehnquist, applied a strict scrutiny test and found the program to be unconstitutional on its face. 448 U.S. at 523. Justice Stevens' dissent finding the program to be unconstitutional required the "most exact connection between justification and classification". 448 U.S. at 537.

Fullilove is relevant to this issue only in that it specifically left undetermined the test to be applied under the Fourteenth Amendment to state action in administering a Congressionally adopted race based program. Applying the various opinions in *Fullilove*, the contractors assumed for the purposes of this litigation that the intended application of 106(c) of STURAA complies with *Fullilove* and, therefore, is facially constitutional. Since *Fullilove* does not address the issue posed by the contractors' challenge to the state action, the conclusion that the act is facially constitutional, i.e. can be applied in a constitutional manner, has no bearing on the outcome of the challenge.

The issue posed by the contractors has been before the Court on one prior occasion. In *H.K. Porter Company, Inc. v. Metropolitan Dade County, et al.*, 489 U.S. 1062 (1989), the Court summarily vacated the judgment of the United States Court of Appeals for the Eleventh Circuit and remanded the case "for further consideration in light of" *Croson*. In *H.K. Porter*, a contractor who bid on a

federally financed project let by Metropolitan Dade County (hereinafter "MDC") was denied the contract because he failed to meet the MBE goal for the project. The MBE goal was part of an affirmative action plan adopted by the county pursuant to regulations under the Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, 92 Stat. 2689 (1978). The contractor in *H.K. Porter* had argued, among other issues, "that since Congress delegated to MDC the actual implementation of (the) . . . MBE provision, MDC was required to make detailed and specific findings concerning past discrimination." *H.K. Porter Company, Inc. v. Metropolitan Dade County*, 825 F.2d 324, 331 (11th Cir. 1987). Without such findings, the contractor argued the court could not conclude that the program was narrowly tailored under the standards set forth in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986). The Eleventh Circuit, in rejecting the contractor's claim, held that MDC was relying on Congressional findings of discrimination in government contracting and that MDC was not constitutionally required to make additional findings of past discrimination. *H.K. Porter*, 825 F.2d at 331.

The issue has been considered by the Seventh Circuit in light of *Croson* and is now before the Court again. The difficulty courts face in reconciling *Fullilove* and *Croson* is apparent in the decisions of the district court and the Seventh Circuit in this matter. The district court conceded the "textual support" in *Fullilove* for the contractor's position and the emphasis in *Fullilove* on remedying only the effects of prior discrimination. App., pp. 40a-41a. The district court rejected the contractors' argument that *Croson* takes over where *Fullilove* left off, and that recipients were required to undertake the searching self examination required by *Croson*. The district court held that this conclusion is "inconsistent with the reasoning of the overall opinion". *Id.*

The Seventh Circuit held that *Croson* has no bearing on the contractors' challenge to state action in administering the DBE program on federally funded projects. Notwithstanding the discretion left to the states in deciding whether and how to administer the program and a record that shows that the state does not administer the program in a manner designed to remedy the effects of past discrimination, the Seventh Circuit held that the challenged state action is subject to no further scrutiny if it facially complies with the federal regulations. The Seventh Circuit escapes the *Fullilove/Croson* dilemma only by cutting off the argument by asserting that the contractors' challenge to state action in administering the program was a collateral attack on the federal statute and regulations.

III. THE SEVENTH CIRCUIT ALLOWS TO THE STATES AUTHORITY TO ADOPT AND IMPLEMENT RACE BASED PROGRAMS WHICH EXCEEDS THE AUTHORITY IMPLIED BY THE STATUTE AND REGULATIONS AND THE HOLDINGS IN *FULLILOVE, WYGANT* AND *CROSON*.

The practical effect of the Seventh Circuit's decision is that a state now has greater authority to implement a race based program than Congress has. A logical reading of *Fullilove* is that the program adopted by Congress touched the outer reaches of its authority under Section 5 of the Fourteenth Amendment. *Fullilove*, 448 U.S. at 487, 490 (C.J. Burger); 448 U.S. at 516 (J. Powell); 448 U.S. at 527 (J. Stewart); 448 U.S. at 548-549 (J. Stevens). It is also a fair reading of *Fullilove* that the program at issue was found to be within Congress' authority because the administrative provisions were intended to assure, as the district court held (App., pp. 38a-41a), that the use of race would be limited to remedying the adverse effects of known discrimination and nothing more. *Fullilove*, 448 U.S. at 487-489.

The authority which Congress exercised in adopting § 106(c) of STURAA is not unlimited or unbounded. Therefore, any state which voluntarily chooses to bring its actions under the umbrella of such authority must abide by the limits and act within the boundaries of such authority. The Court has held that Congress in exercising its powers under Section 5 of the Fourteenth Amendment cannot authorize a state to do what the amendment itself prohibits. In *Katzenbach v. Morgan*, 348 U.S. 641, 651 n. 10 (1966), the Court stated that a Congressional action authorizing "racially segregated systems of education" or by logic any other race based program is not a measure "to enforce" the Equal Protection Clause because it would authorize the very thing the clause prohibits. In *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969), Justice Brennan writing for the Court states:

> Congress may not authorize the States to violate the Equal Protection Clause. Perhaps Congress could induce state participation in school construction if it authorized the use of joint funds for the building of segregated schools. But, could it seriously be contended that Congress would be constitutionally justified in such cooperation by the need to secure state cooperation? Congress is without power to enlist state cooperation by legislation which authorizes the States to violate the Equal Protection Clause.

Thus, to the extent that a state is acting pursuant to Congress' authority, they cannot do more than Congress itself could do.

The Court has never held that Congress can enlist state cooperation to discriminate on the basis of race except for the limited purpose of remedying past discrimination. In the matter before the Court, Congress has not mandated race based state action, but has sought voluntary state action to remedy known discrimination. In a similar setting, *Fullilove* placed limits on Congress' authority to induce race based state action, but left open the question

of what level of scrutiny should be applied to state action in administering the federal program.

The state and others have argued that *Fullilove* authorizes race based state action in the absence of specific findings of discrimination in that state or market. But, *Fullilove* does not say this, nor has any decision of the Court approved such action. *Croson* is strongly to the contrary. Where the Court has upheld the exercise of Congress' authority under Section 5 of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 5 (or the Thirteenth and Fifteenth Amendment counterparts), the application of a race based remedy is limited to those situations in which a specific finding of discrimination has been made.

The Court has carefully scrutinized the exercise of Congress' and a court's remedial powers in similar situations under the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253; Voting Rights Act of 1968, Pub. L. No. 89-110, 79 Stat. 439; and Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81. See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966) and *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding race neutral remedies); *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 16 (1971) (remedy limited to constitutional violation shown); *Hills v. Gautreaux*, 425 U.S. 284, 293-297 (1976) (regionwide race conscious remedy limited to situation in which HUD was already in violation of its constitutional and/or statutory duties); *Milliken v. Bradley*, 418 U.S. 717, 746 (1974) (discrimination cannot be extrapolated in one jurisdiction from the history of discrimination in another jurisdiction). See also, *U.S. v. Starrett*, 840 F.2d 1096, 1101 (2nd Cir.), *cert. den.*, 488 U.S. 946 (1988); *Mann v. City of Albany, Ga.*, 833 F.2d 999, 1006 (11th Cir. 1989). The common thread running through these Acts and the thread on which the Court has clung to in finding the Acts to be constitutional is the requirement that any race based action taken pur-

suant to Congress' authority be based on specific findings of discrimination and that the remedial action be limited to alleviating the effects of that discrimination and nothing more. The direction provided by these cases does not let one conclude that state action which hides under the umbrella of facial compliance with federal regulations but ignores the remedial purpose underlying the racial preference can be constitutional under any level of scrutiny. To the contrary, the Court's decisions in *Croson* and *Wygant* tell us that any race based state action must be subjected to strict scrutiny.

Notwithstanding any authority the state may derive from Congress, state authority to decide whether and how to participate in a voluntary federal program is limited by Section 1 of the Fourteenth Amendment. U.S. CONST. amend XIV, § 1. Since the program before the Court is not mandatory, state action is required before any effects of the program are felt by the contractors or other persons. The federal act and regulations by themselves have no restrictive effect. The constitutional violation occurs when state action makes them come alive. *Shapiro*, 394 U.S. at 641. The Court in *Croson* and *Wygant* set the standards which are to be applied to such state action. The record is undisputed that the state does not meet these standards.

IV. THE SEVENTH CIRCUIT ERRED IN NOT ALLOWING THE CONTRACTORS' CHALLENGE TO THE STATE'S ADMINISTRATION OF THE DBE PROGRAM BECAUSE THE STATE FACIALLY COMPLIED WITH THE FEDERAL PROGRAM REGULATIONS, WHERE THE RECORD SHOWS THAT THE STATE'S ADMINISTRATION WAS NOT DESIGNED TO BE REMEDIAL AND IS NOT NARROWLY TAILORED.

By holding that the federal program as applied by Wisconsin is constitutional because the state is merely doing what it is authorized to do by the statute and reg-

ulations, the Seventh Circuit avoided review of the state action in voluntarily choosing to participate in the federal program and administering the program without regard for the remedial intent. Two points show that the Seventh Circuit's analysis was plainly in error.

First, the Seventh Circuit ignores that without voluntary state action the DBE program adopted by Congress has no effect. It is only the voluntary action of the state which causes the constitutional violation. *Shapiro*, 394 U.S. at 641. Without this state action, a facial challenge may be brought, but such a challenge would be limited to whether Congress exceeded its authority in adopting the program and whether the regulations can be applied in a constitutional manner so as not to deprive any person of his or her equal protection guarantees. App., p. 6a. *Parker v. Levy*, 417 U.S. 733, 759-760 (1974); *Fortson v. Dorsey*, 379 U.S. 433, 438-439 (1965); and *Aptheker v. Secretary of State*, 378 U.S. 500, 516-518 (1964). This was the situation addressed in *Fullilove*. The constitutionality of the program as applied by an individual state was not addressed in *Fullilove*.

In *Shapiro* the Court faced a situation which is analogous in several key respects to the matter now before the Court. *Shapiro* involved a challenge to a residency requirement provision under the Aid to Families with Dependent Children program (AFDC). The federal government had to approve state plans under the AFDC program. 42 U.S.C. § 602(b) (1968). Federal funding was tied to plan approval. This is similar to the federal highway administration approving state DBE programs under § 106(c) of STURAA. Congress also directed the agency not to approve a plan with a residency requirement of more than one year. This is comparable to Congress directing that DBE programs which set a goal of at least 10 percent be approved.

The plaintiffs in *Shapiro* sued various state officials and the District of Columbia. The federal government was

not a named party. Several defendants argued that the imposition of a one year residency requirement was approved by Congress. The Court's response in *Shapiro* to this issue illustrates the Seventh Circuit's error. Chief Justice Burger, in dissent, stated that Congress has the power to impose the one year residency requirement and constitutionally exercised that power in imposing the requirement on the states. *Shapiro*, 394 U.S. at 643-655. The majority opinion written by Justice Brennan specifically rejects this argument holding that:

> (E)ven if we were to assume, *arguendo*, that Congress did approve the imposition of a one year waiting period, it is the responsive state legislation which infringes constitutional rights. By itself § 402(b) (42 U.S.C. § 602(b) (1968)) has absolutely no restrictive effect. It is therefore not that statute but only the state requirements which pose the constitutional question. *Shapiro*, 394 U.S. at 641.

The situation is no different with respect to the contractors' specific challenge to the state's actions to implement the DBE program on federally funded projects. The challenge is properly brought against these actions, and the only question is what level of scrutiny should be applied to these actions.

Second, the Seventh Circuit viewed the contractors' claim as a facial challenge. This is plainly incorrect. The record shows that the contractors challenged specific actions by the state in applying the DBE program to federal projects. These actions included the decision to voluntarily accept funds in the first instance, the decision not to seek a waiver from the DBE program requirements where no evidence of discrimination was shown, and the decision to implement a DBE set aside program which was not required by the federal regulations and which barred non-DBE contractors from submitting bids. Without specific inquiry into these actions, the Court can have no assurance that Wisconsin's program is tailored in any way to its remedial purpose.

Without any substantive legal authority to support its position, the Seventh Circuit limited its scrutiny to whether the state action facially complies with the federal regulations. The court's mistaken reliance on *Fullilove* for the proposition that any state action which falls under the umbrella of authority granted by Congress is *per se* constitutional was a device to allow the court to avoid the dilemma of reconciling *Fullilove* and *Croson*. The contractors ask the Court to address this dilemma and decide the level of scrutiny to apply to such state action.

CONCLUSION

The Court's resolution of the issue presented by this petition is needed to define the scope of individual rights and state obligations under the Fourteenth Amendment. For the reasons set forth above, the petitioners request that the petition for a writ of certiorari be granted.

Dated this 12th day of April, 1991.

Respectfully submitted,

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April 12, 1991

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 90-1747, 90-1793

MILWAUKEE COUNTY PAVERS ASSOCIATION, *et al.*,
Plaintiffs-Appellants-Cross-Appellees,

v.

RONALD R. FIELDLER, individually and in his capacity as Secretary of the Wisconsin Department of Transportation, and DAVID MANNING, individually and in his capacity as the Department's Minority Business Programs Director,
Defendants-Appellees-Cross-Appellants.

Appeal from the United States District Court
for the Western District of Wisconsin

No. 89 C 177—Barbara B. Crabb, *Chief Judge*

Argued December 4, 1990—Decided January 15, 1991

Before POSNER and FLAUM, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge.*

POSNER, *Circuit Judge.* An association of highway contractors in Wisconsin brought suit to enjoin, as a form of affirmative action or reverse discrimination that violates the equal protection clause of the Fourteenth Amendment, programs by which the State of Wisconsin sets aside certain highway contracts for firms that are certified as "disadvantaged business enterprises" and also requires highway contractors to give prefer-

ential treatment to subcontractors that are so certified. The reason the latter as well as former feature of the programs harms the contractors is that it both requires them to award some subcontracts to contractors that are not the low bidders and (like the prime set-aside program) limits their own ability to compete for subcontracts. The programs are of two basic types, which the district judge treated differently in her opinion. 731 F. Supp. 1395 (W.D. Wis. 1990). In the first type of program the state is the principal, rather than an agent of federal highway authorities, because the state receives no money from the federal government; this the judge enjoined, on the authority of *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), and the state appeals. In the second type of program the state is the administrator and disbursing agent of federal highway grants; this the judge refused to enjoin, on the authority of *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and the association appeals.

Croson holds that the equal protection clause forbids states and municipalities to discriminate in favor of blacks and other minorities unless the discrimination is necessary to rectify discrimination against the favored groups. Wisconsin has made no effort to show that its program (for we are speaking now of the program that the district judge enjoined) is remedial in that or any other sense. But it argues that *Croson* does not govern here because the discrimination is not racial in character, the favored class being defined not as minority business enterprises but as disadvantaged business enterprises. "Disadvantaged" means excluded from the mainstream of American economic life, and the agency of exclusion need not be discrimination. An Appalachian white male might be disadvantaged in the relevant sense.

All this is fine but ignores the fact that the state *presumes* a black, but not an Appalachian or any other sort of white male, to be disadvantaged. The presumption is,

it is true, rebuttable. But it seems to us (we can find no decision on the point, save another district court decision which relies heavily on Chief Judge Crabb's opinion in this case, *Contractors Ass'n v. City of Philadelphia*, 735 F. Supp. 1274, 1292-1307 (E.D. Pa. 1990)) that a racial presumption is a form of racial discrimination, as would be obvious if the state had a rebuttable presumption that black subcontractors ought not to be permitted to work on state highway projects. And a majority of the Justices of the Supreme Court believe that racial discrimination in any form, including reverse discrimination, is unconstitutional when done by states or municipalities, unless the purpose is to provide a remedy for discrimination against the favored group. *City of Richmond v. J.A. Croson Co.*, *supra*, 109 S.Ct. at 721 (plurality opinion), 735 (concurring opinion).

To trigger the presumption of disadvantage in the Wisconsin state programs, a subcontractor need only establish that 51 percent of its owners fall into one of four racial-ethnic groups (black, Hispanic, Asian, American Indian) or is a woman. Anyone who is not a member of one of these groups must prove that he is socially and economically disadvantaged in fact. The presumption can be rebutted, but given the difficulty of establishing whether a particular individual is socially and economically disadvantaged the availability of the presumption is likely to be decisive. This means that the state is conferring a significant benefit—access to a presumption of social and economic disadvantage that is the key to valuable entitlements—on grounds that *Croson* forbids a state to use without establishing that the purpose is to rectify invidious discrimination. The state can if it wants redistribute wealth in favor of the disadvantaged, but it cannot get out from under *Croson* by pronouncing entire racial and ethnic groups to be disadvantaged. The whole point of *Croson* is that disadvantage, diversity, or other grounds for favoring minorities will not justify governmental racial discrimination other

than by the federal government; only a purpose of remedying discrimination against minorities will do so.

There is a possible exception. *Croson* is about favoritism toward racial and ethnic groups, not about favoritism toward women. The Supreme Court does not consider discrimination against women to be as invidious—as harmful and as difficult to justify—as discrimination against blacks or other racial minorities; nor, to come to the point, does it consider discrimination against men to be as invidious as racial discrimination. *Craig v. Boren*, 429 U.S. 190 (1976). (In treating sex discrimination less severely than racial discrimination, the Court is following a distinction in Title VII of the Civil Rights Act of 1964, which establishes a defense of bona fide occupational qualification for sex discrimination but denies it for racial discrimination. 42 U.S.C. § 2000e-2(e)(1).) So maybe the state's program, insofar as it favors women, is not controlled by *Croson*. The state has waived the argument, however, by failing to make it, and by its silence has thus conceded that *Croson* applies to affirmative action in favor of women just as it does to affirmative action in favor of blacks and other racial and ethnic minorities. We need not decide whether this was a prudent concession. On the one hand it can be argued that if discrimination against women is not so invidious as discrimination against blacks, the case for using discrimination to remedy past wrongs is less urgent; the past wrongs were less severe, less harmful. On the other hand it can be argued that if sex discrimination is not so serious a wrong as racial discrimination we need not worry about confining its use to the remedial setting.

In neither *Kahn v. Shevin*, 416 U.S. 351 (1974), nor *Orr v. Orr*, 440 U.S. 268 (1979), both involving state laws discrimination against men, did the Supreme Court insist that the law be shown to be remedial within the meaning of *Croson*. But of course those decisions predate *Croson*. What vitality they retain is an issue we

shall leave to a case in which the issue is preserved for appeal.

The basic question raised by the contractors' appeal is the proper characterization of the state's role under section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987, P.L. 100-17, 101 Stat. 132, 145. The Act offers the states financial assistance with highway construction. Of course this assistance comes with strings attached. Section 106(c)(1) requires that 10 percent of the amounts appropriated under the Act "be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." Regulations issued by the federal Department of Transportation to implement this provision establish the very definitions and procedures discussed above in connection with the state program, 49 C.F.R. pt. 23, subpt. D—for that program piggybacks on the definitions and procedures in the federal regulations. The regulations also establish criteria and procedures by which a state can seek an exemption from the 10 percent minimum set aside for disadvantaged enterprises. 49 C.F.R. §§ 23.64(e), 23.65. The receipt of funds under the federal Act is voluntary, but a state that decides to receive such funds is bound by the regulations. 49 C.F.R. § 23.63. Oddly, the regulations fail to mention women as one of the groups eligible for the presumption of disadvantage. 49 C.F.R. § 23.62. That is because the regulations date from a 1983 highway construction law and women were first made beneficiaries in the 1987 version, the one in issue here. The regulations were amended to include women, 49 C.F.R. pt. 23, subpt. D, App. A, Section-by-Section Analysis: Section 23.62 Definitions, but amended clumsily, so that the intention to entitle women to the presumption remains obscure as a matter of semantics. But everyone, including the district judge, 731 F. Supp. at 1401, has assumed that they are entitled to it; we shall assume so as well.

The program the contractors are challenging is similar to the one upheld in the *Fullilove* case. That too was a program of construction grants to the states (but for public works generally, rather than just for highway construction) containing a 10 percent set aside for minority (rather than for disadvantaged) business enterprises. The Supreme Court held that the program was constitutional "on its face." This meant that the statute might be applied in a constitutional way and hence should not be condemned in advance, but left open the possibility that it might be condemned later because of the way in which it was administered in fact. Our contractors do not question the continuing authority of *Fullilove*, the validity of the set-aside provision (section 106(c)(1)) in the Surface Transportation Act, or the validity of the federal regulations that implement that provision. They challenge the Act neither on its face nor as applied. But they argue that *Croson* prevents the state from playing the role envisaged for it by the Act and regulations unless the state is able to show that the set-aside program, as implemented in Wisconsin, is necessary to rectify invidious discrimination. Having made no such showing, the state should (the contractors argue) have refused to apply for funds under the Act, should if it did apply and receive such funds have sought an exemption from the 10 percent set-aside requirement, and rather than presuming social and economic disadvantage from membership in a class defined by reference to race, gender, or ethnicity should have insisted on proof of actual disadvantage by each firm seeking certification as a disadvantaged business enterprise.

These arguments, whatever merit they have or lack as an original matter, are inconsistent with the contractors' decision not to challenge the validity of the federal statute or regulations. Insofar as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil

servants who drafted the regulations. The statute contemplates that states which decide to accept funds under it will reserve a portion of those funds for a class of disadvantaged contractors that, by virtue of a presumption created by regulations conceded to be valid, are likely to consist for the most part of enterprises controlled by members of the favored groups. If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of the litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution.

It is true that the statute does not *require* the states to accept funds under it and, by doing so, to become subject to the set-aside provision and the implementing regulations. But it authorizes them to do so, and action pursuant to a valid authorization is valid. The joint lesson of *Fullilove* and *Croson* is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do. And one way it can do that is by authorizing states to do things that they could not do without federal authorization. That was *Fullilove;* it is this case as well.

There is an analogy to the power of Congress to lift the bar of the "dormant" or "negative" commerce clause. The quoted words refer to the interpretation of the commerce clause (Art. I, § 8, cl. 3) as, by its own force, without any need for congressional action, forbidding the states to interfere unduly with interstate commerce. If Congress wants, it can authorize states to engage in activities that but for the authorization would violate the dormant commerce clause. *Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 652-53 (1981); *Northeast Bancorp v. Board of Governors*, 472 U.S. 159, 174 (1985). Why then cannot Congress use its powers under section 5 of the Fourteenth Amendment to authorize states to engage in activities

that would otherwise violate section 1 of the amendment by virtue of *Croson*? See generally Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 Stan. L. Rev. 387 (1983).

The answer may be that the commerce clause and section 5 of the Fourteenth Amendment are worded differently. The commerce clause authorizes Congress to regulate commerce; section 5 authorizes Congress to "enforce" the provisions of the amendment. It is difficult to see how authorizing a state to violate the amendment could be thought a means of enforcing the amendment. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 732 (1982). But the paradox is superficial. Often the federal government by hook or crook, "enlist[s] a branch of state government . . . to further federal ends." *FERC v. Mississippi*, 456 U.S. 742, 762 (1982). Here it has enlisted states as its agents to help administer a program conceded to be within the scope of section 5. To disallow the states from playing this role would merely hamstring the federal program.

The contractors point out that the remedial objective which persuaded the Supreme Court to uphold the set-aside program challenged in the *Fullilove* case may be a fiction when it is applied to a liberal northern state with a relatively small minority population, such as Wisconsin, that does not even attempt to ascertain the existence of a legacy of discrimination that might justify favored treatment for highway construction firms owned by blacks, or Hispanics, or American Indians, or Asians, or women. But this is just to argue that set-aside programs such as this, upheld on their face in *Fullilove*, are, as administered, the practice of cynical racial or interest-group politics. Maybe so. If so, the program violates the Constitution. But the plaintiffs are not challenging the set-aside program, a creature of federal statute and federal regulations. They are challenging the state's role in

the program. Insofar as the state is merely doing what the statute and regulations envisage and permit, the attack on the state is an impermissible collateral attack on the statute and regulations. We add that the federal regulations explicitly permit the state or other entity receiving the grant to apply the presumption without investigating the situation of particular applicants. "[T]he basic meaning of a presumption of social and economic disadvantage is that the recipient *assumes* that a member of the designated groups is socially and economically disadvantaged. In making certification decisions, the recipient relies on this presumption, and does not investigate the social and economic status of individuals who fall into one of the presumptive groups." 49 C.F.R. pt. 23, subpt. D. App. A, Section 23.69 Challenge Procedure (emphasis in original).

Of course if the state exceeded its federal authority, it would be vulnerable to challenge under *Croson*—it *is* vulnerable to such challenge, as we have seen, insofar as it took the presumption in the federal regulations and applied it to programs not funded under and therefore not governed by the federal statute. Chief Judge Crabb found that the state exceeded its authority under the federal statute in two other, minor ways as well, and enjoined those violations. We agree with her action and for the reasons she gave. 731 F. Supp. at 1413-15. The state would be further vulnerable if it made the racial presumption in the regulations irrebuttable, for that would be going beyond the authorization in the federal program. It has not done so.

However, the contractors also complain about the state's *administration* of the presumption, and that is precisely the sort of complaint that *Fullilove* allows. They note that only two members of a favored minority group have been held not to be socially and economically disadvantaged—two wealthy black football players. But the contractors acknowledge that they have made no ef-

fort to present, in proceedings for the certification of disadvantaged business enterprises, evidence rebutting the presumption accorded the members of the favored groups. They say that it is too big a burden to ask them to bear; that the state should make a fuller investigation of the applicants for certification. But again the contractors are quarreling with a regulation whose validity they have conceded. For in explaining that the racial presumption is rebuttable, the federal regulation states: "This"—the regulation is referring to the proposition that the presumption is rebuttable—"means that, as part of a challenge to the eligibility of a firm . . . , a third party may present evidence that the firm's owners are not truly socially and/or economically disadvantaged, even though they are members of one of the presumptive groups." 49 C.F.R. pt. 23, subpt. D, App. C. The regulation establishes the procedure that the plaintiffs, inconsistently, challenge while conceding its validity.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Date: January 15, 1991

Before: HONORABLE RICHARD A. POSNER, Circuit Judge
HONORABLE JOEL M. FLAUM, Circuit Judge
HONORABLE THOMAS E. FAIRCHILD, Senior Circuit Judge

Nos. 90-1747 and 90-1793

MILWAUKEE COUNTY PAVERS ASSOCIATION, a Wisconsin Corporation, B.R. AMON AND SONS, INCORPORATED, a Wisconsin corporation and BARRICADE FLASHER SERVICE, INCORPORATED, a Wisconsin corporation, et al.,
Plaintiffs-Appellants
Cross-Appellees

v.

RONALD R. FIELDLER, individually and in his capacity as Secretary of the Wisconsin Department of Transportation and DAVID MANNING, individually and his capacity as Wisconsin Department of Transportation Minority Business Programs Director,
Defendants-Appellees
Cross-Appellants

Appeals from the United States District Court
for the Western District of Wisconsin

No. 89 C 177, Judge Barbara B. Crabb

JUDGMENT—WITH ORAL ARGUMENT

These causes were heard on the record from the above mentioned district court, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in these causes appealed from be, and the same are hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

89-C-177-C

MILWAUKEE COUNTY PAVERS ASSOC., a Wisconsin corporation, B.R. AMON & SONS, INC., a Wisconsin corporation, BARRICADE FLASHER SERVICE, INC., a Wisconsin corporation, RODIF BEAUDOIN & SONS, INC., a Wisconsin corporation, BOULANGER CONST. CO., INC., a Wisconsin corporation, BRINKMANN ENGINEERING, INC., a Wisconsin corporation, JAMES CAPE & SONS CO., a Wisconsin corporation, CENTURY FENCE, a Wisconsin corporation, EARTH, INC., a Wisconsin corporation, HANZ CONTRACTORS, INC., a Wisconsin corporation, JOHNSON SAND & GRAVEL, INC., a Wisconsin corporation, TOM KUEHNE LANDSCAPE CONTRACTOR, INC., a Wisconsin corporation, LA LONDE CONTRACTORS, INC., a Wisconsin corporation, MILWAUKEE GENERAL CONSTRUCTION CO., INC., a Wisconsin corporation, A.W. OAKES, a Wisconsin corporation, PAC-SAC CONSTRUCTION, a Wisconsin corporation, PAVING MIX & CONSTRUCTION CO., INC., a Wisconsin corporation, PHEIFER BROS. CONST. CO., INC., a Wisconsin corporation, RELIANCE CONSTRUCTION CO., INC., a Wisconsin corporation, ROCK ROAD OF WISCONSIN, INC., a Wisconsin corporation, STOEHR GRADING CO., INC., a Wisconsin corporation, SUPER EXCAVATORS, INC., a Wisconsin corporation, TRIERWEILER CONST. & SUPPLY CO., INC., a Wisconsin corporation, VINTON CONSTRUCTION CO., a Wisconsin corporation, ZIGNEGO COMPANY, a Wisconsin corporation,

Plaintiffs,

v.

RONALD R. FIEDLER, individually and in his capacity as Secretary of the Wisconsin Department of Transportation, and DAVID MANNING, individually and in his capacity as Wisconsin Department of Transportation Minority Business Programs Director,

Defendants.

ORDER

Plaintiffs, construction companies in Wisconsin, brought this action challenging the constitutionality of the Wisconsin Department of Transportation's Disadvantaged Business Development and Training Program, Wis. Stat. § 84.076. In an order entered February 27, 1989, I granted plaintiffs' motion for a preliminary injunction enjoining defendants' implementation of Wis. Stat. § 84.076. *Milwaukee County Pavers Ass'n v. Fiedler (Milwaukee County Pavers I)*, 707 F. Supp. 1016 (W.D. Wis. 1989). On April 7, 1989, the February order was modified to dissolve the preliminary injunction insofar as it enjoined contracts that were primarily federally funded. *Milwaukee County Pavers v. Fiedler (Milwaukee County Pavers II)*, 710 F. Supp. 1532 (W.D. Wis. 1989).

On June 16, 1989, plaintiffs filed an amended complaint. In Count I, plaintiffs repeat the contention that the disadvantaged business set-aside program in Wis. Stat. § 84.076 violates the equal protection clause of the Constitution by creating classifications based on race, sex and national origin. In Count II, plaintiffs contend that the set-aside program is not permitted under the federal regulations implementing the Surface Transportation and Uniform Relocation Assistance Act of 1987 because the set-aside program violates state law, and because it is not needed to satisfy any goals under federal law.[1] (For

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[1] Federal reuglations provide that states shall establish set-asides "[w]here not prohibited by state or local law and determined . . . to be necessary to meet [federal] goals" 49 C.F.R. § 23.45(k).

simplicity, I will refer to the Surface Transportation and Uniform Relocation Assistance Act as the 1987 Surface Transportation Act and its predecessor as the 1982 Surface Transportation Act.) In Count III, plaintiffs challenge Wis. Stat. § 84.075 for the first time on an equal protection ground. This statute governs construction contracts with *minority* businesses (as opposed to disadvantaged businesses) and requires the Wisconsin Department of Transportation to ensure that 5% of the total amount expended on awarding construction contracts is paid to businesses certified by the department as minority businesses. In Count IV, plaintiffs contend that Wisconsin's efforts to meet its goals under the 1987 Surface Transportation Act are unconstitutional. These efforts include the establishment of the disadvantaged business set-aside program in Wis. Stat. § 84.076 but are not limited to that program. They also include the setting of goals for disadvantaged business subcontractor participation in projects that are not set aside for disadvantaged business prime contractors. Plaintiffs contend that defendants have set an arbitrary goal of 10% expenditure on disadvantaged business contracts which is unrelated to the effects of past discrimination in Wisconsin. They also contend defendants have denied or threatened to deny good faith waivers to contractors from individual project goals despite reasonable efforts by the contractors to secure bids from qualified disadvantaged business contractors. Finally, plaintiffs contend that because state law prohibits defendants from discriminating or from granting contracts to other than the lowest bidder, defendants must seek a waiver from the presumptive 1987 Surface Transportation Act goal of 10% disadvantaged business participation in federally funded projects.[2] Plaintiffs stated in their amended complaint that they would

[2] Federal regulations permit states to set goals of less than 10% based on "[l]egal or other barriers impeding the participation of disadvantaged businesses at at least a ten percent level." 49 C.F.R. § 23.65(d).

seek to proceed as a class, but have since advised the court they would not pursue class certification.

This case is now before the court on the parties' cross-motions for summary judgment.

In their motion for summary judgment, defendants contend first that this case should be dismissed for failure to join the federal government as an indispensable party. Second, they challenge the justiciability of some of the issues raised in plaintiffs' amended complaint, contending that there is no case or controversy with respect to minority business, as opposed to disadvantaged business preferences, because the statutes enacting these minority preferences have never been implemented. Further, they assert that there is no case or controversy regarding their past practice of setting goals for disadvantaged business subcontractor participation on exclusively state funded projects because they ceased that practice in March 1989. Finally, defendants contend that this court lacks jurisdiction under the Eleventh Amendment to entertain plaintiffs' challenges based on rights created by state law.

Both parties have re-argued legal issues that were resolved in earlier rulings in this case, but without presenting additional facts that bear on these issues. I will not reconsider the ruling that the Wisconsin statute creates irrebuttable race, sex and national origin classification. *Milwaukee County Pavers I*, 707 F. Supp. at 1031. I continue to hold that the Wisconsin set-aside program, as it has been applied thus far, is a subsidiary of the federal program under the 1987 Surface Transportation Act. *Milwaukee County Pavers II*, 710 F. Supp. at 1544.

The following issues remain for resolution on the parties' cross motions for summary judgment: (1) whether this case should be dismissed for plaintiffs' failure to join the federal government as an indispensable party; (2) whether there is any justiciable case or controversy regarding Wisconsin statutes that the state has

never implemented or has represented it no longer implements; (3) whether defendants must make findings of past discrimination in Wisconsin to ensure that primarily federally funded set-aside projects are a narrowly tailored remedy for Congressional findings of past discrimination; (4) whether in fact the defendants administer their disadvantaged business set-aside program constitutionally in certifying disadvantaged businesses, in expending state funds, in setting goals for disadvantaged business subcontractors on projects set aside for disadvantaged prime contractors, and in extending the set-aside program to June 30, 1995; and (5) whether this court has jurisdiction over claims that the set-aside program violates Wisconsin statutory and constitutional law.

For the reasons that follow, I conclude first that plaintiffs' failure to join the federal government as a party does not constitute a ground for dismissal because the federal government has no legally cognizable interest in this case. Second, there is no case or controversy with regard to the minority business goals in Wis. Stat. §§ 84.075 and 84.076(2) because it is undisputed that these sections have never been implemented. However, defendants' voluntary cessation of the practice of setting disadvantaged business enterprise participation goals on projects funded exclusively by the state does not deprive this court of jurisdiction over plaintiffs' challenge to the constitutionality of that practice. Third, it would be inconsistent with *Fullilove v. Klutznick*, 448 U.S. 448 (1980), to require states to make findings of prior discrimination to ensure that their implementation of the federal 1987 Surface Transportation Act requirements is narrowly tailored.

Fourth, insofar as defendants are required by federal law to spend state funds on primarily federally funded projects, the use of state funds does not alter the fact that the state is implementing a constitutional federal affirmative action program. However, the state's use of

race-conscious relief is outside the bounds of federal authority and therefore unconstitutional in three respects: (1) in setting goals for disadvantaged business subcontractor participation in projects funded exclusively by the state, (2) in requiring disadvantaged business prime contractors to make good faith efforts to use disadvantaged business subcontractors, and (3) in extending the Wisconsin set-aside program past the date for which the 1987 Surface Transportation Act disadvantaged business enterprise program is authorized. Finally, this court lacks jurisdiction under *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), over plaintiffs' claims that defendants' disadvantaged business program violates Wisconsin's competitive bidding law, anti-discrimination statute and state constitution.

From the parties' proposed findings of fact and supporting materials, and for the purpose only of deciding this motion, I find there is no genuine issue as to the following material facts.

Undisputed Facts

Plaintiff Milwaukee County Pavers Association is an association representing highway construction contractors in good standing with the Wisconsin Department of Transportation. The remaining plaintiffs (except Johnson Sand & Gravel, Inc. and Pac-Sac Construction, Inc.) are highway construction contractors in good standing with the Wisconsin Department of Transportation. Plaintiffs Johnson Sand & Gravel, Inc. and Pac-Sac Construction, Inc., were certified as disadvantaged firms at one time but were decertified by the Department on findings that they were not actually managed and controlled by disadvantaged individuals. No other plaintiff has applied for certification as a disadvantaged business. Plaintiffs bid routinely as prime contractors on the Department's highway projects or submit quotes as subcontractors for work on these highway projects.

Defendant Fiedler is Secretary of the Wisconsin Department of Transportation, charged with the duty to implement and administer the disadvantaged business enterprise program. Defendant Manning is Disadvantaged Business Programs Director for the department.

1. *Federal requirements for disadvantaged business participation*

In 1983, Congress enacted a quadrennial transportation authorization act entitled the Surface Trasportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097, 2100. This act required each state receiving federal aid to make reasonable efforts to award at least 10% of the federal funds to firms owned and controlled by socially and economically disadvantaged individuals.

The subsequent authorization act, the Surface Transportation and Uniform Relocation Assistance Act of 1987, contained similar provisions. Pub. L. 100-17, § 106(c), 100 Stat. 145. Section 106(c) of the Act contained language establishing a ten percent goal for expenditures with disadvantaged businesses. In addition, it included women as a group presumed to be disadvantaged; refined the definition of small business; required states to compile an annual listing of disadvantaged business enterprises; required states to conduct on-site visits of disadvantaged business enterprises; and required the Secretary of Transportation to establish minimum uniform criteria for states to use in determining whether a business is disadvantaged. The regulations implementing the 1982 and 1987 acts are codified at 49 C.F.R. § 23.

2. *State receipt of federal highway funds*

The Federal Highway Administration is the federal agency primarily responsible for administering federal highway aid programs in Wisconsin. The Wisconsin Department of Transportation and the Federal Highway Administration are parties to contracts for the receipt

of federal highway funds. As a condition of receiving federal funding of state highway construction projects, Wisconsin must comply with federal rules regarding contracting generally, and regarding the 1987 Surface Transportation Act disadvantaged business program in particular. 49 C.F.R. § 23.68.

The Wisconsin Department of Transportation has administered a disadvantaged business enterprise program since 1982. The department enters into a separate contract with the Federal Highway Administration for each individual highway project for which the state receives federal funds. Each contract must contain the following statement:

> (1) Policy. It is the policy of the Department of Transportation that minority business enterprises (MBE's), as they are defined in 49 CFR Part 23 [for the purposes of 49 CFR Part 23, Subpart D, MBE's refer to disadvantaged business enterprises (DBE's); for the purposes of other subparts of Part 23, MBE's include women's business enterprises (WBE's)], shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under the agreement. Consequently, all applicable requirements of 49 CFR Part 23 apply to this agreement.
>
> (2) Obligation. The recipient or its contractor agrees to ensure that MBE's as defined in 49 CFR Part 23, have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with Federal funds provided under this agreement. In this regard, all recipients or contractors shall take all necessary and reasonable steps in accordance with the applicable section of 49 CFR Part 23 to sesure that MBE's have the maximum opportunity to compete for and perform contracts. Recipients and their

> contractors shall not discriminate on the basis of race, color, national origin, handicap, religion, age or sex, as provided in Federal and State law, in the award and performance of DOT-assisted contracts.

Under these contracts, the state is reimbursed by the federal government for funds it expends on federally approved projects. It receives approximately $200 million a year in federal highway funds.

3. *Setting overall goals for expenditures on disadvantaged business enterprises*

Recipients of federal highway assistance must set overall goals for participation by disadvantaged businesses that are "practical and related to the availability of [disadvantaged businesses] in desired areas of expertise." 49 C.F.R. § 23.45(g). Any overall goal of less than 10% must be justified with information concerning, among other things, the recipient's efforts to locate disadvantaged businesses, the recipient's efforts to make disadvantaged businesses aware of contracting opportunities, the availability of disadvantaged businesses, the size and other characteristics of the minority population in the recipient's jurisdiction, and legal or other barriers impeding the participation of disadvantaged businesses at a 10% level and the recipient's efforts to overcome or mitigate the effects of these barriers. 49 C.F.R. § 23.65.

In 1988 and 1989, the Wisconsin Department of Transportation set a goal of "not less than 10% of federal funds." The department did not consider setting a goal of less than 10% and did not consider the existence or effects of prior discrimination in setting the disadvantaged business enterprise goal. Its policy is to adhere as closely to 10% as possible, but not spend less. In 1987 it achieved a 13.1% expenditure and in 1988 projected 15.7% but achieved only 13.1%.

4. *Certification of Disadvantaged Business Enterprises*

States may certify as disadvantaged business enterprises only those businesses that meet the eligibility standards in 49 U.S.C. § 23.62. Under 49 C.F.R. § 23.62, a firm is disadvantaged if it is a small business concern and is owned and controlled by individuals who are socially and economically disadvantaged. The regulation adopts the definition of small business in the Small Business Act and imposes the additional requirement that the business concern may not have annual average gross receipts in excess of $14 million. States are directed to make a rebuttable presumption that women and members of specified racial and ethnic minority groups are socially and economically disadvantaged and to determine on a case-by-case basis whether individuals who are not members of those groups are socially and economically disadvantaged. Also, as part of its certification procedure, the state must provide a procedure through which third parties may challenge the certification of individuals presumed to be socially and economically disadvantaged. 49 C.F.R. § 23.69.

The Department of Transportation is primarily responsible for the certification of disadvantaged businesses in Wisconsin. The department requires applicants for disadvantaged business status to submit records such as birth certificates, visas, passports or driver's licenses to establish whether they fall within one of the presumptively disadvantaged categories. Also, all applicants must submit resumes, capital contribution documents showing how the individual acquired the ownership interest in the firm, loan agreements, lease agreements, individual and corporate income tax records, and titles to real estate and equipment connected with the firm. Each applicant must submit the same documentation, whether or not the applicant is presumed to be disadvantaged.

The process for determining whether an individual or firm is disadvantaged consists of a desk audit of the

documentation and an on-site review to verify the existence of the business. District employees conduct the initial review and file a report and recommendation to the department's Madison office, where the application is reviewed.[3]

Certification does not depend on a showing that the individual or firm has been the victim of prior discrimination or that the individual's access to contracting opportunities has been impaired by the effects of prior discrimination.

Wisconsin has found a white male disabled veteran of the Vietnam war to be socially and economically disadvantaged despite the fact that he did not fall within a presumptively disadvantaged category. Approximately five applicants in the non-presumptive categories have been rejected. Since 1982, the department has denied certification to or decertified 353 firms. Approximately 75% of those firms were denied certification because the department determined they were not actually owned and controlled by disadvantaged individuals. Most of the remainder were denied certication because they lacked the expertise or resources to operate successfully or because they did not complete the certification process and supply all the necessary information. Two prominent and wealthy black athletes applied and were rejected because the department found that they were not economically disadvantaged.

5. *Setting individual project goals*

One way that a state may achieve its overall goal is by setting individual goals for disadvantaged business

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[3] The parties dispute whether the certification of disadvantaged business firms focuses on the economic disadvantage of the individual or on the economic status of the firm. For reasons explained in the body of the opinion, I find this dispute to be immaterial. Because the dispute is not material, I have not addressed plaintiffs' motion to strike portions of David Manning's fifth affidavit relating to the facts underlying this dispute.

subcontractor participation on each prime contract. 49 C.F.R. § 23.45(g)(2)(ii). Like the overall disadvantaged business participation goals, specific project goals must be "practical and related to the potential availability of [disadvantaged businesses] in desired areas of expertise." 49 C.F.R. 23.45(g)(1). Specific project goals must be based on "known availability of qualified [disadvantaged businesses]." 49 C.F.R. § 23.45(g)(7).

The Wisconsin Department of Transportation's basic methodology for setting goals consists of adding up those portions of a project that disadvantaged business contractors can perform, totalling the estimated project costs for this work, and dividing those figure by the total estimated project costs for all work. The project goal is set as a percentage of the total project costs, not the federal share of the project costs. The Federal Highway Administration does not permit states to apply federal regulations, such as a disadvantaged business enterprise goal requirement, to only the participating percentage portion of the contract that is federally funded.

In determining work that can be performed by disadvantaged businesses on a project, the department uses the following guidelines as maxima:

a. 20% of any work involving trucking;

b. 100% of pavement marking items, except 20% for epoxy items;

c. 100% of sawing items;

d. 100% of landscaping items;

e. 20% of bar steel items;

f. 100% of traffic control;

g. 100% of clearing and grubbing items;

h. 100% of curb and gutter items.

Using this framework, the department sets a benchmark which is then adjusted to be realistic in light of

other considerations such as the time of the year the service is to be performed, the number of disadvantaged firms with the capacity to perform a particular task, and the disadvantaged firms' performance ability as measured by their equipment, other resources, and prime contractor complaints about them.

6. *Granting good faith waivers from individual project goals*

For all contracts on which disadvantaged business subcontractor participation goals have been established, the apparently successful prime contractor must submit information about the participation of disadvantaged firms before the state commits itself to the performance by the prime contractor. 49 C.F.R. § 23.45(h)(1). If the level of disadvantaged business participation does not meet the contract goals, the state may grant a waiver of the goals to the prime contractor if the state is satisfied that the prime contractor has made good faith efforts to meet the goals. 49 C.F.R. § 23.45(h)(2). Each state has discretion to consider whether, under all relevant circumstances, the contractor has "actively and aggressively" attempted to meet the goal. 49 C.F.R. 23.45, Appendix A, at 176. The federal government has provided a non-exclusive, non-exhaustive list of the kinds of efforts that states may consider.[4] It is "not intended to be a mandatory checklist." *Id.*

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[4] 49 C.F.R. § 23.45, Appendix A, contains the following list of factors:

> (1) Whether the contractor attended any pre-solicitation or pre-bid meetings that were scheduled by the recipient to inform MBEs of contracting and subcontracting opportunities;
>
> (2) Whether the contractor advertised in general circulation, trade association, and minority-focus media concerning the subcontracting opportunities;
>
> (3) Whether the contractor provided written notice to a reasonable number of specific MBEs that their interest in the con-

One of the factors the Wisconsin Department of Transportation considers in deciding whether to grant prime contractors a good faith waiver is the price differentials between quotes from disadvantaged business contractors and non-disadvantaged business contractors. Until April 1987, it was the department's practice to presume that a 5% differential was insufficient to excuse a prime contractor from selecting a disadvantaged business subcontractor. The department also presumed that a differential of greater than 5% was excessive. The federal government reversed that practice and instructed the department it could not have an inflexible 5% rule. Since April 1987, it has been the department's practice to reject good faith waiver requests if the contractor does not meet the project goal and refuses to accept dis-

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tract was being solicited, in sufficient tome to allow the MBEs to participate effectively;

(4) Whether the contractor followed up initial solicitations of interest by contracting MBEs to determine with certainty whether the MBEs were interested;

(5) Whether the contractor selected portions of the work to be performed by MBEs in order to increase the likelihood of meeting the MBE goals (including, where appropriate, breaking down contracts into economically feasible units to facilitate MBE participation);

(6) Whether the contractor provided interested MBEs with adequate information about the plans, specifications and requirements of the contract;

(7) Whether the contractor negotiated in good faith with interested MBEs, not rejecting MBEs as unqualified without sound reasons based on a thorough investigation of their capabilities;

(8) Whether the contractor made efforts to assist interested MBEs in obtaining bonding, lines of credit, or insurance required by the recipient or the contractor;

(9) Whether the contractor effectively used the services of available minority community organizations; minority contractors' groups; local, state and Federal minority business assistance offices; and other organizations that provide assistance in the recruitment and placement of MBEs.

advantaged business enterprise quotes the department evaluates as reasonable. Defendant Manning determines whether disadvantaged firm quotes are reasonable on a case-by-case basis. He does not consider the specific effects of prior discrimination in determining whether a disadvantaged firm quote is reasonable.

The price differential between disadvantaged and non-disadvantaged firm quotes is not the dispositive factor in determining whether to grant a good faith waiver. The department policy is to look for sincere and reasonable efforts on the part of the contractor.[5] The department requires an intensive effort on the part of prime contractors. Prime contractors may also be referred to technical consultant, who helps prime contractors locate firms that have been certified as disadvantaged business enterprises and helps these firms find work.

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[5] Plaintiffs attempt to dispute that this is the department's policy by submitting examples of instances in which the department denied good faith waivers on an apparently arbitrary basis. Their primary illustration consists of a comparison of bids submitted by defendant Cape & Sons and by Vinton Construction, neither of which met the DBE goals set for the project. Both contractors had refused to subcontract with Grandville Electric, a disadvantaged subcontractor whose quotation was 9% higher than the lowest bid for the subcontract. Defendants denied a good faith waiver to Cape & Sons and granted one to Vinton.

Plaintiffs urge this court to draw the inference that defendants arbitrarily decide whether a bid is reasonable. However, they have not supplied facts to demonstrate that Cape & Sons and Vinton had made similar efforts to locate disadvantaged business other than Grandville Electric. The mere fact that in one case a good faith waiver was granted and in the other case it was denied is insufficient to raise a dispute as to defendants' policy of granting good faith waivers when the price quoted by a disadvantaged subcontractor is unreasonable *and* the contractor has not made good faith efforts to locate other disadvantaged businesses. *See Fullilove v. Klutznick*, 448 U.S. 448, 470 (1980) (before a waiver request will be honored, grantee of federal funds must determine that the price is unreasonable and that the contractor has "contacted other MBEs and has no meaningful choice but to accept an unreasonably high price.)

7. *Wisconsin's set-aside program*

The federal implementing regulations permit states to use set-aside programs as one portion of an overall program to meet the goals set under the 1987 Surface Transportation Act. 49 C.F.R. § 23.45(k). The set-aside programs allow certain contracts to be awarded to the successful bidder from a pool of bidders limited exclusively to disadvantaged businesses. States may implement set-aside programs "[w]here not prohibited by state or local law and determined by the recipient to be necessary to meet [disadvantaged business enterprise] goals." *Id.*

In 1988, the Wisconsin legislature enacted the Disadvantaged Business Demonstration and Training Program. 1987 Wisconsin Act 399, codified as Wis. Stat. § 84.076. The program was adopted in response to complaints by non-disadvantaged prime contractors that disadvantaged business subcontractors were unable to perform satisfactorily and complaints by disadvantaged businesses that they were unable to compete with non-disadvantaged businesses for prime contracts because of economic barriers they encountered.

In addition, the state believed it could meet its goal more efficiently by using a set-aside program. Under the federal regulations, the entire amount of federal dollars spent on a contract awarded to a disadvantaged prime contractor is counted toward the 10% goal even if portions of the contract are subcontracted to non-disadvantaged businesses. On the other hand, when a project is let to a non-disadvantaged business prime contractor, only the money spent on subcontracts with disadvantaged businesses may be counted toward the goal. By setting aside certain projects for bidding by only disadvantaged businesses prime contractors, the state is able to count all of the federal money spent on the project toward its goal, even if some of the subcontractors are not disadvantaged businesses.

The Wisconsin set-aside program directs the secretary to allocate $4,000,000 each fiscal year for the awarding of contracts to certified disadvantaged business enterprises. Wis. Stat. § 84.076(2)(a). On its face, the program applies to projects funded with state, local and federal appropritaions. *Id.* However, the set-aside program has never been applied to projects funded exclusively by the sttae and it is the department's policy to apply it only to projects for which federal aid is sought.[6]

Initially, the Wisconsin set-aside program was designed to end on June 30, 1991. 1987 Wisconsin Act 399, § 305rh. The deadline has now been extended to

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[6] Plaintiffs rely on minutes from the July 19, 1988 meeting of the Transportation Advisory Committee to attempt to put this fact into dispute. At the meeting, defendant Manning explained the recently-enacted set-aside program. The minutes state "Both State and Federal projects may be included in the demonstration program." However, the author of the minutes, Eugene Johnson, has sworn,

> of my own personal knowledge I know that the phrasing was used to distinguish between those projects already earmarked for federal assistance and those state projects that could be earmarked in the future as part of the selection process for projects that would be suitable for federal funding and inclusion in the DBE demonstration program.

In addition, defendant Manning has testified,

> I can tell you that when the projects were first selected [for the set-aside program] they were not federally funded projects, and we insisted and put them through the paper work necessary to convert them over to federally funded before we accepted them into the program . . . We had made a commitment to the Wisconsin Road Builders Association and to the disadvantaged businesses that this was going to be an extension of a federal program, that any dollars that we achieved in this program would be counted towards our regular 10 percent overall goal. And without having it federally funded, you couldn't do that.

June 23, 1989 deposition of David Manning at 71-72.

Given this undisputed testimony, I find plaintiffs' speculations concerning the meaning of the committee minutes insufficient to raise a dispute concerning the intent to apply the set-aside program only to federally funded projects.

June 30, 1995. 1989 Wisconsin Act 31 § 2198ho, codified as Wis. Stat. § 84.076(5).

The set-aside program itself includes requirements for disadvantaged business participation projects let to disadvantaged business prime contractors. Each bid by disadvantaged prime contractors must include a goal that at least 25% of the total number of workers in all trades employed on the project will be disadvantaged individuals and a subcontracting plan "that provides sufficient detail to enable the secretary to determine that the prime contractor has made or will make a good faith effort to award at least 20% of the total contract amount to bona fide independent disadvantaged business subcontractors." *Id.* States may use set-asides to meet their federal goals under the 1987 Surface Transportation Act "only in cases where at least three [disadvantaged business enterprises] with capabilities consistent with contract requirements exist so as to permit competition." 49 C.F.R. § 23.45(k). On June 20, 1989, the department let two projects under Wisconsin's set-aside program. On one of these projects, only one bid was submitted. No bids were submitted on the second project. However, prior to letting these projects, defendant Manning prepared a memorandum listing four disadvantaged firms considered qualified to bid on one project and seven disadvantaged firms considered qualified to bid on the other project.

8. *Wisconsin's minority business provisions*

In addition to Wisconsin's efforts to identify and involve *disadvantaged businesses*, there are two state statutory provisions relating specifically to *minority* businesses.

First, in 1984 the Wisconsin legislature enacted Wis. Stat. § 84.075, entitled "Contracting with Minority Businesses." 1983 Wisconsin Act 27 § 1329r, 1983 Wis. Laws 426-27. The statute controls expenditures for highway

improvement construction contracts and for state trunk highway maintenance contracts. Wis. Stat. § 84.075(1). It requires the department to "attempt to ensure that 5% of the total amount expended in each fiscal year is paid to contractors, subcontractors and vendors which are minority businesses." *Id.* It further provides that in attempting to meet the 5% goal, the department "may award any contract to a minority business that submits a qualified responsible bid that is no more than 5% higher than the liw bid." *Id.*

Wis. Stat. § 84.075 has never been implemented.[7]

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[7] Plaintiffs attempt to dispute this fact by arguing, "until March 1989, the department set projects goals on state funded projects, presumably pursuant to § 84.075, Stats. Plaintiffs are aware of no other authority for state project DBE goals." Plaintiffs do not cite to any evidence in the record to support thier contention that the state project goals were set pursuant to Wis. Stat. § 84.075.

However, the deposition testimony of defendant Manning explains the genesis of the state funded project goals as follows:

> That was a policy [to set project goals for state funded projects] that was put down by then Secretary Lowell Jackson. The rationale was to try to have—this only applied, by the way, to projects located in the southeastern part of Wisconsin, meaning Milwaukee basically, where 70 percent of our DBE firms are located. And there was a request from the DBE community at that time that . . . there were projects that they could participate on, that were known, but they couldn't participate on them because there were no goals on them. And if there were no goals, that meant the prime contractors were indisposed to using them. So Lowell Jackson said that in some cases the district should be free to set goals on some of these ideal projects where DBEs sought to and could be used. That was the rationale for the policy.

June 23, 1989 deposition of David Manning at 38. Manning also testified that although there were goals on certain state funded projects, "there was no overall goal for state-funded projects only. It was just a haphazard situation on individual projects only." *Id.* at 41.

Plaintiff's speculation that the goals were set pursuant to Wis. Stat. § 84.075 does not put into dispute the testimony of James Thiel, general counsel for the department that "in no instance has 84.075 ever been applied by this department. It's a dormant statute."

Second, the statute creating the disadvantaged business set-aside program contains a minority business goal. It provides separate definitions for "disadvantaged business," and "minority business." Wis. Stat. § 84.075(1).[8] § 84.076(2) requires the secretary to "attempt to ensure that 75% of the amount . . . allocated each fiscal year [under the set-aside program] is for the awarding of contracts under this section to minority businesses." It is the department's policy not to implement this portion of the statute.[9]

9. *Use of state funds for disadvantaged business contracts*

Until March 1989, the department set goals for disadvantaged business subcontractor participation on some projects funded exclusively by the state. The policy of setting goals on exclusively state funded projects was initiated by former department secretary Lowell Jackson in response to requests from the disadvantaged business community that the department create an incentive for prime contractors on certain known state funded projects to use disadvantaged business subcontractors. These goals were set on a haphazard basis, primarily in southeastern Wisconsin and were not part of an attempt to reach any overall goal for disadvantaged business participation on exclusively state funded projects. The department terminated the policy in March 1989 because

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[8] The definition of "disadvantaged business" incorporates federal administrative procedures for making and challenging findings of social and economic disadvantage. Wis. Stat. § 84.076(1)(a). The definition of "minority business" incorporates state definitions in Wis. Stat. § 560.036.

[9] Plaintiffs attempt to put this fact into dispute by asserting that "the states's policy is set forth in the statute and the department is obligated to comply with the statute." This is insufficient to put into dispute deposition testimony of defendant Manning that the Department has not carried out the directive in Wis. Stat. § 84.076(2) to insure that 75% of contract awards go to minority businesses.

of the possibility it might fall within the scope of the preliminary injunction in this case.

State funds are also expended as matching funds on the projects for which the state receives federal highway funds. These include projects set aside under § 84.076 and non-set-aside projects on which the state sets disadvantaged business subcontractor participation goals. Federal law sets the relative state-federal financing share; the federal share is at least 75% unless the state elects to contribute a larger share. 23 U.S.C. § 120. Wisconsin has never made an election to exceed 25% of the funding for its state highway improvement program. Only the federal funds expended under the contracts count toward the 10% goal. In 1988, approximately $4.158 million of state money was awarded to disadvantaged businesses. In 1989, $5 million of state money will be awarded to disadvantaged businesses.

OPINION

A. *Joinder of the Federal Government*

A threshold issue is whether this case should be dismissed for plaintiffs' failure to join the federal government as an indispensable party under Fed.R.Civ.P. 19, as defendants contend. Rule 19 requires the joinder of any party who claims an interest relating to the subject of the action and is so situated that the disposition of the action in the absence of that party would leave persons already parties "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." Fed.R.Civ.P. 19(a)(2)(ii). Defendants argue that Congress's conditioning of $200 million of highway funds on compliance with the 1987 Surface Transportation Act would create inconsistent obligations if plaintiffs succeeded in obtaining an order enjoining defendants from complying with the Act.

The federal government is not an indispensable party in this case. The question whether failure to join a

party would expose an existing party to inconsistent obligations is contingent upon an initial requirement that the absent party have a legally cognizable interest in the subject matter of the suit. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir. 1983). Defendants assert that the federal government has an interest in plaintiffs' challenges to the constitutionality of defendants' disadvantaged business program but do not elaborate on the source or nature of that interest. Defendants appear to ground the federal government's interest on the ruling in *Milwaukee County Pavers II* that the state's disadvantaged business program is an extension and implementation of congressional legislation. 710 F. 2d at 1546. However, plaintiffs' challenges to the constitutionuality of Wisconsin's disadvantaged business program are directed toward the state's implementation of the federal legislation, not toward the federal legislation itself. On the converse of this question, the Court of Appeals for the Fifth Circuit ruled that a state is not an indispensable party when the complaint was "directed primarily at the constitutionality of a federal statute . . . and not at the procedures employed by [the state]" to implement it. *Romero v. United States*, 784 F.2d 1322, 1325 (5th Cir. 1986).

Failure to join the federal government does not require dismissal of this case.

B. *Justiciability Questions*

1. *Minority business statutes*

The power of a federal court to rule on the constitutionality of a statute can be exercised only if the interests of the litigants require the use of judicial authority for protection against actual interference with their rights. *J.N.S., Inc. v. State of Indiana*, 712 F.2d 303, 305 (7th Cir. 1983), *citing Golden v. Zwickler*, 394 U.S. 103, 110 (1969); *United Public Workers v. Mitchell*, 330 U.S. 75,

89-90 (1947). Plaintiffs need not await the actual enforcement of a statute to bring a challenge to its legitimacy, but, they cannot present a justiciable controversy unless they can show that the threat of enforcement has immediate coercive consequences. *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 252 (7th Cir. 1981). Uncertain or speculative business injury will not support a finding that an actual controversy exists. *Id.*

It is undisputed that the Wisconsin Department of Transportation has never implemented the 5% minority business goal in Wis. Stat. § 84.075 and the portion of Wis. Stat. § 84.076(2)(a) that requires that 75% of the $4 million set-aside be allocated to minority businesses. Plaintiffs have presented no evidence to suggest that their business interests have been harmed or impaired in any way by threatened enforcement of these minority business statutes. Therefore, because plaintiffs fail to allege an actual case or controversy with respect to these statutes, I decline to exercise jurisdiction over challenges to their constitutionality.

2. *Mootness of challenges to disadvantaged business subcontractor goals on exclusively state funded projects*

It is well established that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1981). For a defendant's voluntary cessation to render a case moot, (1) there must be no reasonable expectation that the alleged violation will recur, and (2) the effects of the alleged violation must have been completely and irrevocably eradicated. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1978). In a voluntary cessation case, the defendant bears a heavy burden to persuade the court that a controversy is moot. *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988).

Defendants have not met this burden with respect to the constitutionality of disadvantaged business subcontractor participation goals on exclusively state funded projects. It is undisputed that, in the past, defendants set such goals on projects that were funded exclusively by the state, and that they terminated this practice in March 1989 as a result of uncertainty about the scope of the preliminary injunction entered in this case. Because defendants ceased setting goals on state projects only after this court entered preliminary injunctive relief, it is not reasonable to assume that they will continue to refrain in the future from setting such goals absent judicial intervention. There remains a live case or controversy with respect to the constitutionality of the state's policy of setting goals for disadvantaged business subcontractor participation on exclusively state funded projects.

C. *Constitutionality of Wisconsin's Disadvantaged Business Preferences*

1. *Legal background*

As plaintiffs note in their brief, the issues in this case bring into focus the interaction between two benckmark affirmative action cases, *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and *City of Richmond v. Croson*, 488 U.S. ——, 109 S.Ct. 107 (1989). In *Fullilove*, the Supreme Court rejected a facial challenge to the constitutionality of a federal affirmative action statute requiring that 10% of federal funds granted for local public works projects be used to procure services or supplies from minority businesses. In *Croson*, the Court struck down a state minority business set-aside program enacted for the purpose of promoting wide participation by minority business enterprises in the construction of public projects.

The most important distinction between the federal program held constitutional in *Fullilove* and the state program held unconstitutional in *Croson* is Congress's

power to "provide for the general Welfare of the United States" and "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment. Art. I, § 8, cl. 1; Amdt. 14, § 5. *Fullilove*, 448 U.S. at 472. In *Fullilove*, the Court held that it was because of these powers that Congress "acted within its competence" in imposing an affirmative action program to remedy nationwide discrimination in the construction industry. *Id.* at 478. In *Croson*, the Court held that

> unlike any State or political subdivision, [Congress] has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.

Croson, 109 S.Ct. at 719, *citing Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (emphasis in the original). In contrast to Congress's broad power to identify and remedy past discrimination, states "must identify that discrimination, public or private, with some specificity" to gain the authority to impose race-conscious relief. *Croson*, 109 S. Ct. at 727.

In *Milwaukee County Pavers I*, I granted a preliminary injunction against the implementation of Wisconsin's disadvantaged business enterprise set-aside program on the ground that the program was supported by only "generalized and conclusory" evidence of past discrimination which was insufficient to meet the rigorous requirements of *Croson*.[10] 707 F. Supp. at 1028. However, I left open the possibility that the state program was a "mere elaboration on the federal scheme" in the 1987 Surface Transportation Act, and that if it were, the state could

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[10] Plaintiffs challenged only the set-aside program in their original complaint.

rely on congressional findings of past discrimination. *Id.* at 1031.

Defendants moved to dissolve the preliminary injunction based on evidence concerning the relationship of Wisconsin's disadvantaged business program to the federal program in the 1987 Surface Transportation Act. *Milwaukee County Pavers II*, 710 F. Supp. at 1534. In deciding that motion, I found as fact that the Wisconsin disadvantaged business program "is properly considered a subsidiary element of the federal legislation," and concluded that the state could rely on the congressional findings underlying the 1987 Surface Transportation Act. *Id.* at 1546. Therefore I applied a *Fullilove* analysis to Wisconsin's disadvantaged business set-aside program.

In *Fullilove*, the Court looked first to the objectives of the legislation to see whether they were within the power of Congress. 448 U.S. at 473. It was in this step of the analysis that the Court analyzed Congress's power to make the required findings of past discrimination. After determining that Congress had the institutional authority to make findings of past discrimination under the enforcement clause of the Fourteenth Amendment, the Court looked at Congress's employment of racial and ethnic classifications to determine whether it was narrowly tailored to the goal of remedying prior discrimination. *Fullilove* 448 U.S. at 480.

In applying this analysis to Wisconsin's disadvantaged business set-aside program, I found first that in enacting the 1987 Surface Transportation Act, "Congress had before it ample evidence of past discrimination in the construction trade and could constitutionally enact race-conscious remedies and impose them upon the states." *Milwaukee County Pavers II*, 710 F. Supp. at 1549. Because the state's implementation of the federal program included an administrative waver procedure, employed rebuttable presumptions of economically disadvantaged status, was of limited duration, and had a reasonable

goal, I concluded that it was narrowly tailored to remedy the discrimination identified by Congress. *Id.* at 1550. Therefore, I dissolved the preliminary injunction insofar as it enjoined the letting of primarily federally funded programs under the state set-aside program. *Id.* at 1552.

2. *Narrow tailoring of Wisconsin's implementation of the federal disadvantaged business enterprise program*

In the briefs supporting their motion for summary judgment, plaintiffs concede the constitutionality of the federal act and Congress's authority to enact race-conscious relief based on evidence of nation-wide discrimination in the construction trade. What they challenged is Wisconsin's implementation of the disadvantaged business enterprise program in the 1987 Surface Transportation Act on the ground that it is not narrowly tailored.

a. *Necessity of findings of past discrimination*

As a starting point, plaintiffs renew their argument that the state must ground its use of race-conscious relief on findings of past discrimination within the state. Instead of arguing that the state's administration of the 1987 Surface Transportation Act is governed by *Croson*, plaintiffs argue now that a state must make findings of past discrimination in order to ensure that the federal program it administers is narrowly tailored under *Fullilove*. Pointing out that *Fullilove* involved a facial challenge to a congressional statute and did not address the constitutionality of a state's implementation of that statute, plaintiffs argue that *Fullilove* requires defendants to use findings of past discrimination in the state as a benchmark in setting overall goals under the 1987 Surface Transportation Act, in certifying disadvantaged businesses, in setting individual project goals, and in granting good faith waivers to prime contractors.

Plaintiffs' position is not without textual support. In upholding the congressional remedy in *Fullilove*, the Court stated,

> It is also contended that the MBE program is overinclusive—that it bestows a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination. It is conceivable that a particular application of the program may have this effect; however, the peculiarities of specific applications are not before us in this case. We are not presented here with a challenge involving a specific award of a construction contract or the denial of a waiver request; such questions of specific application must await future cases.

448 U.S. at 486. In discussing the administrative scheme of the minority business program challenged in *Fullilove*, the Court makes repeated reference to whether the program is tailored to remedy only the effects of prior discrimination. *Id.* at 481-82. The Court also notes,

> Petitioners have mounted a facial challenge to a program developed by the politically responsive branches of Government. For its part, the Congress must proceed only with programs narrowly tailored to achieve its objectives, subject to continuing evaluation and reassessment; administration of the programs must be vigilant and flexible; and, when such a program comes under judicial review, courts must be satisfied that the legislative objectives and projected administration give reasonable assurance that the program will function within constitutional limitations.

Id. at 490.

Despite the clear emphasis in *Fullilove* on remedying prior discrimination, it would be inconsistent with the reasoning of the overall opinion to adopt plaintiffs' in-

terpretation. By requiring states to make findings of past discrimination to meet the "narrowly tailored" requirement, plaintiffs conflate the two-step analysis set out in *Fullilove*. This blurring of the line between Congress's authority to make findings of past discrimination and the means it employs to address that discrimination threatens to eviscerate Congress's unique remedial power. As the court stated in *Fullilove*,

> It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive authority to enforce equal protection guarantees. Congress may not only induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, *it may, as here, authorize and induce state action to avoid such conduct.*

Id. at 483-84 (emphasis added). If Congress's power to authorize and induce state action were reduced in implementation to the redress of specific identifiable instances of discrimination, Congress's remedial power would be no different from the remedial power of a court. It may have been in response to this concern that Justice Burger closed his opinion in *Fullilove* with quotes from former Justices Jackson and Brandeis admonishing the courts to restrain themselves from encroaching on the province of the legislature. *Id.* at 490-91.

b. *Rebuttability of economic disadvantage*

In *Milwaukee County Pavers II*, I identified five factors in *Fullilove* that are important to a determination whether a race-conscious remedial program is narrowly tailored. 710 F. Supp. at 1550. One of these factors was that the "[t]he criteria of eligibility are rebuttable, thus assuring that only minorities who are economically disadvantaged may participate in the program." *Id.*

Plaintiffs now contend that defendants' implementation of the disadvantaged business program is not narrowly tailored because defendants do not make adequate inquiry into the economic disadvantage of applicants for disadvantaged business enterprise status, making the presumption of disadvantaged status irrebuttable as applied by defendants.

Plaintiffs' argument is based on their allegation that in reviewing applications for certification as a disadvantaged business enterprise, defendants look at the financial status of the firm, not at the economic status of the socially disadvantaged individuals who have ownership interests or control in the firm. As discussed above, defendants dispute this characterization of the facts, asserting that they look at economic disadvantages at both the firm and the individual level.

The parties' dispute is immaterial to a determination whether the program is narrowly tailored, as shown by an examination of the minority business certification procedures discussed in *Fullilove*. The minority business enterprise program was held to be a narrowly tailored remedy because, in part, it provided "an administrative mechanism . . . to ensure that only bona fide MBE's are encompassed by the remedial program." *Fullilove*, 448 U.S. at 482. In summarizing these administrative mechanisms, the Court referred to economic disadvantage at both the individualand firm levels:

> It will be recalled that in the Report of the House Subcommittee on SBA Oversight and Minority Enterprise the Subcommittee took special care to note that when using the term "minority" it intended to include "only such minority *individuals* as are considered to be economically or socially disadvantaged." The Subcommittee also was cognizant of existing administrative regulations designed to ensure that *firms* maintained on the lists of bona fide minority business enterprises be those whose com-

> petitive position is impaired by the effects of disadvantaged and discrimination.

Id. at 471 (emphasis added).

The economic status of the firm and the individual are each relevant to a determination whether the firm should be certified as a disadvantaged business enterprise (and may well be interconnected).

3. *Extent of state's authority under federal law*

Plaintiffs challenge three aspects of defendants' use of disadvantaged business preferences as unconstitutional because they are allegedly outside the bounds of federal authority: (1) the use of state funds that do not count toward the federal goal; (2) the requirement that disadvantaged prime contractors make good faith efforts to use disadvantaged subcontractors on projects let under the set-aside program; (3) the letting of projects under the set-aside program when fewer than three disadvantaged businesses submit bids.

a. *State expenditures*

According to plaintiffs, defendants misuse state funds in three ways: (1) using state matching funds on primarily federally funded projects; (2) setting disadvantaged business subcontractor goals based on total project costs rather than on the federal share of project costs; and (3) setting goals for disadvantaged subcontractor participation in projects funded exclusively by the state.

The earlier opinions in this case did not distinguish between the set-aside program and the department's other efforts to meet its overall goal under the 1987 Surface Transportation Act, because plaintiffs were challenging only the set-aside program in Wis. Stat. § 84.076. In addition to setting aside projects for bidding only by disadvantaged prime contractors, the Wisconsin Department of Transportation sets goals for participation by disad-

vantaged subcontractors on individual projects that are not part of the set-aside program. To date, the department has let only primarily federally funded projects under the set-aside program. However, the state has set goals for disadvantaged subcontractor participation on both primarily funded projects and on exclusively state funded projects. In *Milwaukee County Pavers II*, I concluded that "insofar as the statute permits the allocation of funds that are not primarily federal or projects that are not primarily federally funded, it cannot be considered part of the federal legislation." 710 F. Supp. at 1551. I noted that

> [t]he same analysis and conclusions would not apply if the monies were not primarily federal and were not counted toward the 10% goal. Then the state program would be more akin to a state program modeled on a federal program than one implementing and subsidiary to a federal program.

Milwaukee County Pavers II, 710 F. Supp. at 1544. I did not address what percentage of the money spent on a project must be federal for the project to be deemed primarily federally funded, but held that projects that receive 70-75% of their funding from federal sources meet the requirement. *Id.* at 1544, at n.6.

In light of the more specific challenges in plaintiffs' amended complaint, it is necessary to examine more closely the constitutionality of state expenditures under Wisconsin's disadvantaged business program. I conclude that it is not *per se* unconstitutional for defendants to allocate state or local expenditures for use on contracts with disadvantaged businesses. What is important to a determination of constitutionality is not the source of the funds, but the source of the state's authority for spending the funds. Where federal law dictates that a project must be partially funded by the state, the expenditure of state funds does not cause the program to lose its character as a federal program. However, when the state provides

race-conscious relief that bears no relationship to meeting its overall goal under the 1987 Surface Transportation Act, it is acting on its own and must base its action on state findings of prior discrimination.

First, regarding the partial state funding of federally funded projects, it is federal law that requires states to provide matching funds for federally funded highway projects and sets the relative state-federal financing share. 23 U.S.C. § 120. Unless the state elects to provide a greater share, the federal share for projects that require state matching funds is always at least 75%. *Id.* It is undisputed that Wisconsin has never made the necessary election to increase its share of the funding on the federal projects. However, even if it did, under the analysis I now apply, the state would stay within its role as implementor of a federal program and rettain the authority to impose race-conscious relief based on congressional findings of prior discrimination.

Second, it follows from this ruling that the state is within the bounds of federal authority when it uses the total project costs to set individual goals for disadvantaged business subcontractor participation on projects that receive federal funding. Federal regulations require that goals set on specific contracts be based on the known availability of qualified disadvantaged businesses. 49 C.F.R. § 23.45(g)(7). Plaintiffs do not dispute the fact that the Federal Highway Administration does not permit states to apply this requirement to only the portion of the project that is federally funded. When the state is required to contribute 25% of the costs of the project, only 75% of the money actually spent on disadvantaged business subcontractors will be counted toward the overall federal goal. However, this result is dictated by the requirement that 10% of the *federal* money received by the state must go to disadvantaged businesses. It does not limit the state's authority to set goals based on the total project costs.

Third, it follows also from this analysis that when the state sets individual project goals for disadvantaged business participation in projects funded by the state, it is not acting to implement a federal program. The goals for subcontractor participation set on exclusively state funded projects bear no relationship to the 1987 Surface Transportation Act. None of the money spent on these projects counts toward the federal goal or any other overall goal. The goals are set in direct response to requests from the disadvantaged business community for more work. Although the state complements the legislative purposes of the 1987 Surface Transportation Act in providing additional incentives for contractors to use disadvantaged subcontractors, it has taken this action without making the necessary findings that the disadvantaged subcontractors were victims of past discrimination, and therefore has acted unconstitutionally.

Defendants argue that even if it is unconstitutional for the state to set disadvantaged business subcontractor goals on exclusively state funded projects, plaintiffs are not entitled to injunctive relief because defendants' actions in setting disadvantaged business subcontractor goals on exclusively state funded projects were "isolated prior incidents." Defendants cite *Los Angeles v. Lyons*, 461 U.S. 95 (1983) and *Rizzo v. Goode*, 423 U.S. 362 (1976), for the proposition that plaintiffs may not request injunctive relief based on isolated incidents, and argue that even if plaintiffs had standing, disadvantaged business goals are based on disadvantaged status and not race, national origin or gender and are therefore constitutional.

Defendants' arguments are unconvincing. In both *Lyons* and *Rizzo*, the Court held that the plaintiffs lacked standing to challenge alleged constitutional violations because they failed to demonstrate that the violations were committed pursuant to a deliberate policy or pattern endorsed or authorized by city officials. *Lyons*, 461 U.S.

at 106; *Rizzo*, 423 U.S. at 374. By contrast, in this case plaintiffs challenge a deliberate policy by former Department Secretary Lowell Jackson to increase disadvantaged business participation in state projects in the Milwaukee area. Defendants' persistence in arguing that these goals are not based on race, national origin or gender based, despite the ruling to the contrary in *Milwaukee Pavers I* and my reaffirmation of that ruling in *Milwaukee County Pavers II*, 710 F. Supp. at 1539 n.2, serves as additional demonstration of the need for injunctive relief in this case.

Therefore, I conclude that defendants are constitutionally permitted to apply state matching funds to primarily federally funded projects and that the practice of using the total project costs to set disadvantaged business subcontractor participation goals on these projects is constitutional. However, plaintiffs are entitled to injunctive relief against the setting of disadvantaged business subcontractor participation goals on exclusively state funded projects in the future.

b. Disadvantaged business subcontractor participation goals on projects set aside for disadvantaged business prime contractors

Plaintiffs contend that there is no federal authority for the state's enactment of a requirement in Wis. Stat. § 84.076(3)(b) that disadvantaged prime contractors make good faith efforts to use disadvantaged subcontractors. Section 84.076(3)(b) provides,

> Each bid submitted under [the disadvantaged business set-aside program] shall include the following conditions: . . . A subcontracting plan that provides sufficient detail to enable the secretary to determine that the prime contractor has made or will make a good faith effort to award at least 20% of the total contract amount to bona fide independent disadvantaged business subcontractors.

This issue is similar to those concerning the expenditure of state funds and the same analysis applies. The controlling analysis centers on determining how the implementation of the 1987 Surface Transportation Act relates to the requirement that disadvantaged business prime contractors use disadvantaged subcontractors.

The imposition of the additional goals for disadvantaged subcontractor participation on projects let to disadvantaged business prime contractors serves no purpose in the implementation of the 1987 Surface Transportation Act. Under the Act, federal money spent on projects let to disadvantaged prime contractors will count toward the 10% goal whether or not the subcontractors are disadvantaged businesses. 49 C.F.R. § 23.47 (a). It is only when the prime contractor is not a disadvantaged business that the status of the subcontractors becomes relevant under the federal regulations. Ultimately, the federal approach may undermine the purpose of developing a pool of competitive disadvantaged businesses in the state, because it permits a state to meet its overall goal by using disadvantaged prime contractors who then subcontract to non-disadvantaged businesses. However, the federal regulations provide a safeguard against using disadvantaged prime contractors as a "front" for work that is being disproportionately performed by subcontractors. A state receiving federal funds may count toward its goals only expenditures to disadvantaged businesses that "perform a commercially useful function." 49 C.F.R. § 23.47(d)(1). The regulation goes on to state

> If an MBE contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the MBE shall be presumed not to be performing a commercially useful function.

49 C.F.R. § 23.47(d)(2). Whatever the merits of the federal regulations, it is undisputed that it was this

feature of the federal program that led Wisconsin to enact a set-aside program as a more efficient way to meet its overall goal under the 1987 Surface Transportation Act.

Defendants' subcontractor requirement in the set-aside program may well contribute to the overall purpose of enhancing the pool of disadvantaged competitors, which is in line with the purpose of the federal program. However laudable its goals, Wisconsin may not pursue that purpose under the guise of implementing the federal program. Wis. Stat. § 84.076(3)(b) is without federal authorization and is therefore unconstitutional.

c. *Three-bid requirement for set-aside program*

Among plaintiffs' challenges to the administration of Wisconsin's disadvantaged business set-aside program is the contention that the failure of three bidders to come forward on each project strips the program of its federal authorization. According to the federal regulations under the 1987 Surface Transportation Act, set-asides can be used only when there exist at least three disadvantaged businesses "with capabilities consistent with contract requirements exist so as to permit competition." 49 C.F.R. § 23.45(k). In June 1989, the department let two projects under the set-aside program. On one project only one bid was submitted; no bids were submitted on the second project.

Plaintiffs' argument is disingenuous. On its face, the federal regulation requires only that qualified disadvantaged business enterprises *exist*, not that they actually submit bids. Furthermore, a requirement that three disadvantaged firms bid on each project in order to permit states to enact set-aside programs would be administratively unworkable. Defendants cannot control the number of qualified disadvantaged contractors that come forward to bid on set-aside projects.

It is undisputed that before letting these projects, defendant Manning prepared a memorandum listing at least three disadvantaged firms qualified to bid on each project. This was sufficient to meet the requirements in the federal regulations.

4. *Sunset provision*

Finally, plaintiffs challenge the new sunset provision of June 30, 1995 on grounds both that it is without federal authorization and that it causes the program to lose its narrow tailoring. In *Milwaukee County Pavers II*, I ruled that defendants' implementation of the federal act was narrowly tailored, in part because "[t]he state program is also of limited duration, expiring in 1990." 710 F. Supp. at 1550. Since this ruling was made, the Wisconsin legislature extended the set-aside program until June 30, 1995. 1989 Wisconsin Act 31, § 2198ho, creating Wis. Stat. § 84.076(5).

This change not only adds to the program's duration, it also extends it beyond the limits of the 1987 Surface Transportation Act, which expires in 1991. H.R. Conf. Rep. No. 27, 100th Cong., 1st Sess. 147, *reprinted in* 1987 U.S. Code Cong. & Admin. News 121, 132. Defendants contend that this challenge is not yet ripe because it is not yet known whether Congress will extend the program past 1991. Defendants point out that Congress always appropriates for limited numbers of years and that it is therefore inappropriate to view the 1991 date as a sunset provision.

The constitutionality of the state's program depends on its character as an implementation of the federal program. To the extent that the state steps beyond the boundaries of this federal authority, it is acting on its own authority and must base its action on specific findings of identifiable prior discrimination. Congress has authorized the disadvantaged business program in the 1987 Surface Transportation Act through 1991. It is

within the power of the Wisconsin legislature to extend its set-aside program beyond 1991, but it cannot do so on the basis of Congress's authority to find prior discrimination. Therefore, I conclude that Wis. Stat. § 84.076(5) is unconstitutional in this respect to the extent that it authorizes the existence of the set-aside program beyond the date through which the disadvantaged business enterprise program in the 1987 Surface Transportation Act is authorized.

However, I do not mean to imply that a four-year extension of the disadvantaged business set-aside defeats a claim that the program is narrowly tailored. Extending the program through 1995 does not change the basic fact that it is a program of limited duration. If and when Congress extends the authority for appropriations under the 1987 Surface Transportation Act through 1995, the state will be free to implement its extension of the disadvantaged business set-aside program.

D. *Jurisdiction over State Law Claims*

In their amended complaint, plaintiffs contend that the Wisconsin's administration of the disadvantaged business enterprise program in the 1987 Surface Transportation Act violates Wisconsin's competitive business statute (Wis. Stat. § 84.06(2)), Wisconsin's anti-discrimination statute (Wis. Stat. § 15.04) and Art. 1, § 1 of the Wisconsin Constitution. Plaintiffs concede that "in the typical situation" the Eleventh Amendment prohibits federal courts from requiring state officials to conform their conduct to state law. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984). In *Pennhurst*, the Supreme Court traced the history of states' Eleventh Amendment immunity from suit in federal court. It acknowledged that the doctrine in *Ex parte Young*, 209 U.S. 123 (1908), allowing state officials to be sued in federal court for violations of federal law, was a legal fiction designed to accommodate both the need to pro-

mote the supremacy of federal rights and the constitutional immunity of the states. *Pennhurst*, 465 U.S. at 105. The Court went on to recognize that "[t]his need to reconcile competing interests is wholly absent . . . when a plaintiff alleges that a state official has violated *state* law." *Id.* at 106 (emphasis in original). Justice Powell noted, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Id.* Therefore, he concluded, the *Ex parte Young* doctrine is inapplicable to pendent state law claims against state officials. *Id.*

Plaintiffs argue that this is not a typical *Pennhurst* situation because federal administrative regulations expressly incorporate restrictions based on contrary state law provisions. Federal regulations permit recipients to seek waivers from the 10% goal based on "[l]egal barriers . . . impeding the participation of disadvantaged businesses at at least a ten percent level," 49 C.F.R. § 23.65(d); and permit set-aside programs "[w]here not prohibited by state or local law." 49 C.F.R. § 23.45(k).

Although this case does not involve pendent state claims, the basic theoretical framework of *Pennhurst* still applies. Wisconsin state law is the source of the rights plaintiffs seek to vindicate. The fact that federal regulations permit defendants to assert state law limitations on their actions through the federal administrative process does not convert the state law claims into federal rights. Here, as in *Pennhurst*, there is no need to accommodate federal rights to a state's immunity from suit in federal court. It is not the place of this court to rule on the scope of Wisconsin's constitutional guarantee of equal protection or to harmonize the disadvantaged business set-aside program with other state-created statutory protections. Therefore, I decline to exercise jurisdiction over plaintiffs' claims based on violations of Wisconsin's competitive bidding law, anti-discrimination law and the Wisconsin Constitution.

ORDER

IT IS ORDERED that plaintiffs' motion for summary judgment is GRANTED in part and DENIED in part; and this case is DISMISSED with prejudice.

FURTHER IT IS ORDERED that defendants are enjoined permanently from implementing the following aspects of their disadvantaged business enterprise preferences:

(1) The setting of goals for disadvantaged business subcontractor participation on exclusively state funded projects;

(2) The provision in Wis. Stat. § 84.076(3)(b) setting goals for disadvantaged business subcontractor participation on projects let to disadvantaged prime contractors under the state's set-aside program;

(3) Any goals for disadvantaged business subcontractor participation on individual projects or any set-asides under Wis. Stat. § 84.076 past the date that the disadvantaged business enterprise program in the Surface Transportation Uniform Relocation and Assistance Act of 1987 is authorized.

Entered this 6th day of March, 1990.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

89-C-0177-C

MILWAUKEE COUNTY PAVERS ASSN., a Wisconsin corporation, B.R. AMON & SONS, INC., a Wisconsin corporation, BARRICADE FLASHER SERVICE, INC., a Wisconsin corporation, RODDIE BEAUDOIN & SON CO., a Wisconsin corporation, BOULANGER CONST. CO., INC., a Wisconsin corporation, BRINKMANN ENGINEERING, INC., a Wisconsin corporation, JAMES CAPE & SONS CO., a Wisconsin corporation, CENTURY FENCE, a Wisconsin corporation, EARTH, INC., a Wisconsin corporation, HANZ CONTRACTORS, INC., a Wisconsin corporation, JOHNSON SAND & GRAVEL, INC., a Wisconsin corporation, LALONDE CONTRACTORS, INC., a Wisconsin corporation, MILWAUKEE CONSTRUCTION CO., INC., a Wisconsin corporation, A.E. OAKES, a Wisconsin corporation, PAC-SAC CONSTRUCTION, a Wisconsin corporation, PAVING MIX & CONSTRUCTION, a Wisconsin corporation, PHEIFER BROS. CONST. CO., INC., a Wisconsin corporation, RELIANCE CONSTRUCTION CO., INC., a Wisconsin corporation, ROCK ROAD OF WISCONSIN, INC., a Wisconsin corporation, STOEHR GRANDING CO. INC., a Wisconsin corporation, SUPER EXCAVATIONS, INC., a Wisconsin corporation, TRIERWEILER CONST. & SUPPLY CO., INC., a Wisconsin corporation, VINTON CONSTRUCTION CO., a Wisconsin corporation, ZIGNEGO COMPANY, a Wisconsin corporation, on behalf of themselves and all similarly situated persons,

Plaintiffs,

v.

RONALD R. FIEDLER, individually and in his capacity as Secretary of the Wisconsin Department of Transportation, and DAVID MANNING, individually and in his capacity as Wisconsin Department of Transportation Minority Business Programs Director,

Defendants.

ORDER

[Filed Apr. 7, 1989]

This case concerns plaintiffs' constitutional challenge to Wis. Stat. § 84.076 which provides that the State of Wisconsin should reserve $4 million in construction contracts for "disadvantaged" businesses. In an order dated February 27, 1989, I found for the purpose of deciding plaintiffs' motion for a preliminary injunction that businesses were deemed eligible for the disadvantaged business program on the basis of an irrebuttable presumption that those of a specified race, national origin, and gender were socially disadvantaged. I thus determined that plaintiffs had a better than negligible chance of succeeding on the merits of their constitutional claim that the statute violated the equal protection clause of the Fourteenth Amendment because it made racial and ethnic classifications unsupported by the requisite findings of past ediscrimination. Because I found that plaintiffs had also shown that they had no adequate remedy at law, that they would suffer irreparable harm if the injunction was not granted, that the harm to them if the injunction was not issued was greater than the harm to defendants if it was issued, and that the injuncion would not harm the public interest, their motion for a preliminary injunction was granted.

The preliminary injunction was granted based on my provisional understanding of the case. I noted that my view of the merits of plaintiffs' claim might change if the state could show that the presumption that women

and minorities are socially disadvantaged is rebuttable or that the state program is a subsidiary of a federal program and that the state is thus entitled to rely on congressional findings of past discrimination to validate is program.

Now before the court is defendants' motion to dissolve the preliminary injunction or, in the alternative, to modify it. In support of the motion, defendants state they have new arguments and evidence demonstrating that the statutory presumptions are rebuttable and that the state program is the "alter-ego" of a federal program. They also argue that if the injunction is not dissolved it should be modified to clarify certain ambiguities in its language.

Because of the expedited briefing schedule established on plaintiffs' motion for a preliminary injunction, defendants were given little time to prepare their materials in opposition. The injunction that has issued affects many in addition to the parties to this action, in particular, the disadvantaged businesses that would otherwise have received contracts. Furthermore, the constitutionality of a state statute is a matter of public concern that should be resolved promptly and equitably. In such circumstances, the presentation of materials that might lead to a new view of the merits of the case is a justifiable reason for reconsidering the granting of the preliminary injunction. *See Canal Authority of State of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974).

The previous order in this case contained extensive and detailed factual findings. I will not repeat them all here but will include only those portions that are relevant to the resolution of this motion. I include additional factual findings that are derived from the undisputed affidavits and exhibits submitted by the parties on the motion to dissolve the injunction and from the testimony at the March 21, 1989 hearing on defendants' motion.

FACTUAL FINDINGS

In 1983, Congress enacted a quadrennial transportation authorization act entitled the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097, 2100. Section 105(f) of the Act provided as follows:

> Except to the extent that the Secretary determines otherwise, not less than 10 per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 8(d) of the Small Business Act (15 U.S.C. section 637 (d)) and relevant subcontracting regulations promulgated thereto.

The Department of Transportation promulgated detailed regulations implementing this section. 48 Fed. Reg. 33432 *et seq.*, codified at 49 C.F.R. part 23, subpart D (1986).

The subsequent authorization act, the Surface Transportation Uniform Relocation Assistance Act of 1987, contained a similar provision. Pub.L. 100-17, § 106(c), 100 Stat. 145. Section 106(c) of the Act contained language essentially identical to section 105(f) of the 1982 Act establishing a 10% goal for expenditures with disadvantaged businesses. In addition, it included women as a group presumed to be disadvantaged, refined the definition of small business, required states to compile an annual listing of disadvantaged business enterprises, and required the Secretary of Transportation to establish minimum uniform criteria for states to use in determining whether a business is disadvantaged.

Section 105(f) of the 1982 Act and § 106(c) of the 1987 Act apply only to programs under the Federal Highway Administration and Urban Mass Transit Administration. They do not apply to funds authorized for programs under the Federal Aviation Administration, the

Federal Railroad Administration, or the National Highway Traffic Safety Administration.

On October 21, 1987, the Department of Transportation promulgated amendments to the regulations required by the 1987 Act. 52 Fed. Reg. 39225-31. The current regulations are codified at 49 C.F.R. part 23 (1988).

The practice of the Federal Highway Administration in its administration of section 106(c) is to permit states to meet the 10% goal by using disadvantaged businesses either as subcontractors or as prime contractors. When a disadvantaged business is a prime contractor the total dollar amount of the contract may be counted towards the state's required 10% goal even if some of the contract is subcontracted to non-disadvantaged sub-contractors.

49 C.F.R. § 23.45(k), as amended at 52 Fed. Reg. 39229-30, permits states to implement set-aside programs as one portion of an overall program to meet the goals of section 106(c) provided the state demonstrates the need for the set-aside program and provided that adequate competition among disadvantaged business is available. The set-aside programs allow certain contracts to be awarded to the successful bidder from a pool of bidders limited exclusively to disadvantaged businesses. The Federal Highway Administration may require states to adopt set-aside programs if the state cannot otherwise meet its 10% goal.

The Wisconsin Department of Transportation receives approximately $200 million each year in federal highway funds. The state's total highway construction budget is approximately $300-350 million a year. The department expects to receive $195 million in fiscal year 1988-89 for contracts administered by the department and $214 million in total federal funding. Receipt of the funds is contingent upon compliance with the statutory and regulatory requirements concerning disadvantaged businesses. 49 C.F.R. 23.68.

In order to comply with the requirements of the 1982 Act and the regulations promulgated thereunder, Wisconsin enacted a general Disadvantaged Business Enterprise Program. The program is currently in place to comply with the requirements of the 1987 Act. Plaintiffs have not challenged the constitutionality of this program. Defendant Manning, the Disadvantaged Business Programs Director for the Wisconsin Department of Transportation, is charged with ensuring compliance with section 105(f) of the 1982 Act and 106(c) of the 1987 Act and is designated as Wisconsin's liaison with the United States Department of Transportation for the disadvantaged business program.

As a recipient of federal highway aid, each year pursuant to the federal requirements and the general disadvantaged business program that the state has enacted to implement those requirements, the Wisconsin Department of Transportation must and does submit to the United States Department of Transportation a goal for that year's expenditures with disadvantaged businesses in federally assisted highway contracts. Every four months, the department reports its progress toward meeting the goal. Any goal of less than 10% must be approved by the United States Department of Transportation under stringent waiver criteria established at 49 C.F.R. § 23.65.

In fiscal years 1987-1989 Wisconsin has established a disadvantaged business enterprise goal of 10%. In 1987, 13.1% of highway construction expenditures were made with disadvantaged businesses. In fiscal year 1988 the state expected that 15.7% of expenditures would be made with disadvantaged businesses.

More than 90% of the disadvantaged firms that have received state funds have been subcontractors working under non-disadvantaged prime contractors. Of the 1,364 prime contracts let for highway projects since 1984, only 67 have been awarded to disadvantaged firms.

Prior to the enactment of the contested program, non-disadvantaged prime contractors complained to the department about the inability of the disadvantaged businesses to perform satisfactorily. Disadvantaged businesses complained to the department about their inability to compete with non-disadvantaged business for prime contracts because of economic barirers they have encountered.

To remedy these complaints, to assist disadvantaged businesses to become viable and competitive prime contractors, and to promote the award of more contracts to disadvantaged prime contractors so that the state could more efficiently meet its 10% participation goal under section 106(c), the Wisconsin legislature enacted the contested demonstration and training program in 1988. 1987 Wisconsin Act 399, codified as Wis. Stat. § 84.076. The Act states in relevant part:

> *84.076. Disadvantaged business demonstration and training program.*
>
> *(1) Definitions.* In this section:
>
> (a) "Disadvantaged individual" means a minority group member, a woman or any other individual found to be socially and economically disadvantaged by the department as provided in 49 CFR 23.62, unless successfuly challenged as provided in 49 CFR 23.69.
>
> (b) "Disadvantaged business" means a sole proprietorship, partnership, joint venture or corporation that fulfills all of the following requirements, as certified by this department:
>
> 1. Is at least 51% owned by one or more disadvantaged individuals who are u.S. [sic] citizens or persons lawfully admitted to the United States for permanent residence . . .

2. Its management and daily business operations are controlled by one or more of the disadvantaged individuals who own it.

(c) "Minority Business" has the meaning given under s. 560.036(1)(e)1.

(d) "Minority group member" has the meaning given under s. 560.036(1)(f).

(2) *Administration.* (a) The secretary shall administer a demonstration and training program for the purpose of developing the capability of disadvantaged business to participate in construction projects . . . . Beginning in fiscal year 1988-89, from the amounts appropriated under s. 20.395(3)(bq), (bv), (bx), (cq), (cv), (cx), (dq), (dv), (dx), (fq), (fv), (fx), (hq), (hv), and (hx), the secretary shall allocate $4,000,000 each fiscal year for the awarding of contracts under this section . . . .

(b) The secretary shall establish requirements for programs of preapprenticeship training and management and technical assistance designed to develop the expertise of disadvantaged individuals and disadvantaged businesses in transportation construction.

(3) *Bids, contracts.*

. . . The Secretary shall establish a list of disadvantaged businesses that are eligible to submit bids for contracts awarded under this section and subcontractors who meet the requirements under sub. 4(b). Each bid submitted under this section shall include the agreement specified under sub. (4) and all of the following conditions:

(a) A goal that at least 25% of the total number of workers in all construction trades employed on the project will be disadvantaged individuals.

(b) A subcontracting plan that provides sufficient detail to enable the secretary to determine that the

prime contractor has made or will make a good faith effort to award at least 20% of the total contract amount to bona fide independent disadvantaged business subcontractors.

(4) *Contractor responsibilities.* Each contractor shall agree to do one of the following in its bid submitted under sub (3).

(a) 1. Assure that the contractor has developed a program of preapprenticeship training that satisfies the requirements established by the secretary under sub. (2) (b) and has experience in providing the training to disadvantaged individuals; and

2. Assure that the contractor has developed and has experience in providing a program of management and technical assistance to disadvantaged business subcontractors. . . . .

(b) Obtain from a subcontractor that has experience in providing training to disadvantaged individuals a program of preapprenticeship training that satisfies the requirements established by the secretary under sub. (2) (b) . . .

The program is in effect only through June 30, 1991. The department plans to audit the program prior to its termination to evaluate its success.

The appropriations referred to in section (2) (a) of the statute follow a statutorily created pattern. The last letter of each series indicates the source of appropriated funds; "q" indicates state funds, "v" indicates local funds, and "x" indicates federal funds.

Contracts let under the statute are paid for entirely from the $4 million allocated to the program.[1]

The standards and procedures used to determine which individuals and firms qualify as disadvantaged under

[1] I have inferred this fact from the parties' testimony at two hearings before the court and from evidentiary material indicating the bids the state has received on contracts already let.

§ 84.076 are identical to those the state has been using to comply with the Surface Transportation Assistance Act of 1982 and the Surface Transportation and Uniform Relocation Assistance Act of 1987.

The Wisconsin disadvantaged business demonstration and training program is similar to those in three of the other five states in this administrative region of the Federal Highway Administration (Minnesota, Ohio, Illinois).

On July 29, 1988 defendant Manning and defendant Fiedler, the Secretary of the Wisconsin Department of Transportation, presented to the United States Department of Transportation a review of the state's disadvantaged business enterprise program. The review included the following discussion of the contested statute.

> [The disadvantaged business enterprise demonstration and training program] became effective on July 1, 1988. It is a development and training program for the purposes of increasing the capability of disadvantaged businesses to participate on Wis DOT projects. Each year a total of $4 million in projects will be identified to be bid on only by certified DBE [Disadvantaged Business Enterprise] prime contractors. The successful prime bidder will be required to make good faith efforts to award at least 20% of the total contract dollar amount to DBE subcontractors. In addition, each project will have an employment goal of 25% of the total workforce to consist of disadvantaged group members. The prime DBE contractor will also be required to establish an approved training program for disadvantaged individuals working on the /project.
>
> These two initiatives should allow DBEs to become more viable and competitive contractors.

The report justifying Wisconsin's goal of 10% participation in fiscal year 1989 listed several steps the department would take to attain that goal. Among the steps listed were implementation of the demonstration

training program and development of disadvantaged prime contractors.

The report was approved by the Federal Highway Administration on August 31, 1988.

The department designated four projects to be let under Wis. Stat. § 84.076 (STH 38, South Howell Avenue, Portland Cement Concrete Pavement, Milwaukee County; STH 38, South Howell Avenue, Bridge at Root River, Milwaukee County; STH 190, West Capitol Drive, 145th Street, Waukesha County; STH 28, Sheboygan Falls-143, Sheboygan County). The four projects are each on the Federal-Aid Urban System or Federal-Air Primary System of highways in Wisconsin.

A representative of the United States Department of Transportation participated in the selection of the projects for the demonstration and training program. In November 1988 and February 1989, the Wisconsin Department of Transportation officially requested that the Federal Highway Administration approve federal construction funding for the four projects. On December 21, 1988, the department officially requested from the Federal Highway Administration advance authorization of federal engineering funding for the four projects. On December 22, 1988 and January 13, 1989, the Federal Highway Administration approved these requests.

The funding for each project is approximately 75% federal and 25% state (the Portland Cement project includes 3% local funding). The funding derives exclusively from the $4 million allocated to the demonstration and training program under Wis. Stat. § 84.076.

The department anticipates that the federal funding for all highway construction in the state fiscal year 1989 will total $195 million and that $19.5 million must be expended with disadvantaged businesses in order to fulfill the 10% goal mandated by section 106(c) of the 1987 Act. The total amount of federal funds appropriated for fiscal year 1988-89 that is subject to the department's allocation of $4 million for the disadvantaged business

demonstration and training program is approximately $19.5 goal through funds expended under the contested statute as well as through funds expended in its general disadvantaged business program.

In order for expenditures under the contested program to be counted toward the 10% goal, the program must meet the federal requirements set out in section 106(c) of the Act and 49 C.F.R. § 23. Both the department and the Federal Highway Administration foresaw that the federal funds expended with disadvantaged business under the disadvantaged business demonstration and training program would be counted towards the state's 10% goal. All the federal funds expended that were to be in the four projects authorized for fiscal year 1988-89 and enjoined by the previous order of this court were to be counted towards the state's 10% goal.

OPINION

Defendants contend that dissolution of the preliminary injunction enjoining the operation of Wis. Stat. § 84.076 entered by this court on February 27, 1989 is justified because they have presented new evidence and arguments demonstrating that the presumptions of the contested statute are rebuttable and because they have shown that the state statute implements federal law. Their arguments concerning whether the statutory presumptions are rebuttable merely repeat those they have already made and for this reason I have not made any additional factual findings concerning whether the presumptions are rebuttable. A motion for dissolution or modification of an injunction is not an opportunity to reargue a losing claim; that may be done on appeal. Thus, the analysis in this opinion proceeds on the assumption that the Wisconsin statute includes classifications based on race, national origin, and gender. The statute can be found to be constitutional only if the racial and ethnic classifications are constitutional in this particular instance.[2]

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[2] Defendants argue that cases considering the constitutionality of race-based classifications and, in particular, minority business

Defendants' arguments and evidentiary materials concerning the relation of state and federal law are largely new, however. Initially when the parties addressed the motion for a preliminary injunction, they did not consider whether the state program could be considered a subsidiary of a federal program and thus could rely on federal fact finding. The issue was first raised in the opinion granting the motion for a preliminary injunction. The arguments and materials now presented merit consideration. Because I find after review of the evidentiary materials and applicable law that the defendants have shown that the contested state program is a subsidiary to a federal program and that the state may rely on congressional findings of past discrimination, the likelihood of plaintiffs' success on the merits of their claim has diminished considerably. Because plaintiffs can no longer show that they have a better than negligible chance of success, the preliminary injunction will be dissolved. Accordingly, it will not be necessary to consider defendants' alternative request for modification of the injunction or the parties' proposed stipulated modifications.

Analysis

Plaintiffs have argued consistently that the outcome of this action is determined by the United States Supreme Court's recent opinion *City of Richmond v. J. A. Croson*, 57 U.S.L.W. 4132 (January 24, 1989). As noted in the extensive discussion of *Croson* in my earlier opinion, that decision concerns the constitutionality of affirmative action programs enacted by states and local governments. The standards articulated in *Croson* do not apply to federal affirmative action programs or to state programs

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programs, are inapplicable to this case because this action concerns a challenge to a *disadvantaged* business program. However, since in my previous opinion I determined that the operative categories of the statute were race, national origin, and gender and not disadvantage, I now consider the challenged statute to provide for a *minority* business program. Accordingly, the cases considering the constitutionality of race-based classifications are applicable to this case.

which are subsidiary to them. The challenged Richmond program was not related to any federal program and did not involve any federal funds or federal oversight. The Court emphasized that Congress may enact race-based remedial legislation that might be impermissible if enacted by a state or local government. 57 U.S.L.W. at 4137-8.

In my earlier opinion I applied the *Croson* analysis because defendants had not suggested that the challenged program should be considered anything but a state program and thus subject to the stringent standards set out in *Croson*. However, if the state program is subsidiary to a federal program, it should be analyzed as a federal prdogram to which *Croson* would not apply. The applicable standard for analyzing the constitutionality of federal affirmative action programs that impose requirements on state is found in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the only Supreme Court decision addressing a federally imposed minority preference.[3]

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[3] Plaintiffs argue that after *Croson*, *Fullilove* cannot be relied on as precedent. Their contention is refuted by the Court's frequent reliance on *Fullilove* in the *Croson* opinion and its explicit distinction between the standards to be applied to review of federal and state programs. *See* 57 U.S.L.W. at 4137-38, 4142-43; 57 U.S.L.W. at 4138 ("our treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here."); *see also* 57 U.S.L.W. at 41-46-47 (Scalia, J., concurring in the judgment) ([W]ithout revisting what we held in *Fullilove* . . ., I do not believe our decision in that case controls the one before us here).

Nor have the Court's actions since its decision in *Croson* indicated that it considers *Fullilove* to be less than completely inact. Since the *Croson* decision issued, the Court has considered four cases concerning affirmative action programs that were on its docket pending a decision in *Croson*. The disposition of three of those cases is irrelevant to this case or to the legitimacy of *Fullilove* because the cases concerned state or local programs unrelated to any federal program. *See Michigan Road Builders Ass'n, Inc. v. Milliken*, 57 U.S.L.W. 3587 (March 6, 1989), granting certiorari to and summarily affirming without dissent 834 F.2d 583 (6th Cir. 1987) (finding unconstitutional state set-aside because state provided no showing of past discrimination); *Higgins v. City of Vallejo*, 57

In *Fullilove*, the Court considered the constitutionality of a requirement in the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, that 10% of the federal funds granted by the Act to a state or local

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U.S.L.W. 3570 (Feb. 28, 1989), denying certiorari without dissent to 834 F.2d 351 (9th Cir. 1987) (upholding flexible city plan supported by findings); *City of South Bend v. Janowiak*, 57 U.S.L.W. 3570 (Feb. 28, 1989), denying certiorari without dissent to 836 F.2d 1034 (7th Cir. 1988) (finding unconstitutional city hiring plan unsupported by statstically significant findings).

The disposition of the fourth case also has little relevance to these issues. The Court granted certiorari to and vacated a decision by the Court of Appeals for the Eleventh Circuit upholding a local minority business program implementing federal requirements promulgated under the Surface Transportation Assistance Act of 1978. *H.K. Porter Co. v. Metropolitan Dade Co.*, 57 U.S.L.W. 3587 (March 6, 1989), granting certiorari to and vacating 825 F.2d 324 (11th Cir. 1987). Justices Brennan, Marshall, Blackmun and Stevens would have denied certiorari. Although the case also concerned the local implementation of a federally mandated affirmative action program, the legislative context of the program was very different from that which this court confronts. The Surface Transportation Assistance Act of 1978 did not contain any provision for an affirmative action program. The Department of Transportation independently established a regulatory program. In an amici brief submitted to the Court on the petition for certiorari, the United States recommended that certiorari be denied because the statutory framework had changed so substantially that the issues presented by the case were unlikely to recur. Brief for the United States as Amici Curiae at 10, *H.K. Porter*, 57 U.S.L.W. 3587. Thus, the Court's summary disposition of the case gives no indication that the validity of *Fullilove* is in question or that federal programs are to be considered in a new light after *Croson*.

A recent decision of the Court of Appeals for the District of Columbia Circuit also supports the conclusion that the analysis articulated in *Fullilove* should still be applied to federally sponsored minority preferences. *See Shurberg Broadcasting of Hartford, Inc. v. Federal Communications Commission*, slip op. 84-1600 (March 31, 1989). In *Shurberg*, the court of appeals found unconstitutional a program of the Federal Communications Commission that permitted licensees in danger of losing their licenses in a noncompartive hearing to sell the license at a reduced price to a minority buyer. In analyzing whether there existed sufficient congressional findings underlying the program and whether the program was narrowly

government be expended with minority businesses. *Id.* at 453. Writing for a plurality of the Court,[4] former Chief Justice Burger surveyed the legislative history of the Public Works Employment Act and related legislation and determined that "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." *Id.* at 477-8.

After emphasizing the deference the Court must have towards a co-equal branch of government, *Fullilove*, 448 U.S. at 472, the plurality examined the possible bases for Congress' authority to enact race-conscious statutes and to impose race-conscious statutory requirements upon the states. It considered first Congress' Spending Power and the concurrent power to further federal objectives by conditioning receipt of federal funding on compliance with federal statutory requirements, as well as Congress' Commerce Power to regulate inequities affecting interstate commerce. *Id.* at 473-476. It found also that the enforcement power in section 5 of the Fourteenth Amendment granted Congress broad authority to enforce the equal protection commandment and that this power extended to the enactment of race-conscious remedial legislation that imposes requirements on the states. *Id.* at 477-78.

The plurality stressed the flexible nature of the 10% requirement: a waiver could be obtained if sufficient minority businesses were not avalable or if a minority business charged an unreasonable price for its services,

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tailored, the two separate opinions of each of the judges in the majority relied extensively on *Fullilove*. *See id.* at 18, 24-33 (Silberman, J.); *id.* at 5-7 (MacKinnon, J.).

[4] Justices White and Powell joined the Court's opinion. Justice Powell also wrote a lengthy concurring opinion. Justice Marshall filed an opinion concurring in the judgment in which Justices Brennan and Blackmun joined. Justices Rehnquist, Stewart and Stevens dissented.

and an administrative complaint procedure was available. *Id.* at 487-88. The Chief Justice suggested that the constitutionality of the statute was premised on these "assurance[s] that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress and that misapplications of the program will be promptly and adequately remedied administratively." *Id.* at 487.

As Justice O'Connor noted in her opinion in *Croson*, the principal opinion read in conjunction with Justice Powell's concurrence, 448 U.S. at 495-99, 507, and the Court's opinions in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1985), and *Croson* suggests that *Fullilove* should be read to require some congressional findings of past discrimination necessitating remedial action and a showing that the remedial program is narrowly tailored to achieve its ends. *Cf. Shurberg*, slip op. at 24-33 (Silberman, J.) and 5-7 (MacKinnon, J.) (striking down Federal Communications Commission minority preference because program was not narrowly tailored).

Applying the *Fullilove* analysis to the present case, it becomes clear that three questions must be addressed: 1) whether Wisconsin's disadvantaged business demonstration and training program is an integral subsidiary of a federal stataute and thus constitutionally grounded on Congress' Spending Power and its enforcement power under section 5 of the Fourteenth Amendment; 2) whether Congress made sufficient findings of past discrimination upon which the state may rely; and 3) whether the federal statute and the state statute are narrowly tailored to achieve their remedial goals. I will address each question in turn.

1. *Relation of State and Federal Programs*

Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. 100-17 mandates that "[e]xcept to the extent that the Secre-

tary determines otherwise, not less than 10 percent of the amounts authorized to be appropriated under [this Act or its predecessor, the Surface Transportation Assistance Act of 1982] shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." The term "small business concern" is defined by section 3 of the Small Business Act, 15 U.S.C. § 632, and the term "socially and economically disadvantaged individuals" is defined by section 8(d) of the Small Business Act, 15 U.S.C. § 637 (d), except thatthe 1987 Act adds women to that definition. Section 106(c) also requires states to compile annually a list of small business concerns and to adhere to minimum uniform criteria for certifying businesses as disadvantaged. The criteria include "on-site visits, personal interviews, licenses, analysis of stock ownership, listing of equipment, analysis of bonding capacity, listing of work completed, resume of principal owners, financial capacity, and type of work preferred." § 106(c)(4), codified at 49 C.F.R. § 23.45(f) [as ended at 52 Fed. Reg. 39230].

The regulations implementing section 106(c) impose additional requirements on states that wish to receive federal highway funds. The state must submit its overall goals to the Federal Highway Administration. 49 C.F.R. § 23.64(c). If the goal is 10% or more, the state must describe the methodology used to reach its overall goal and its goals for individual contracts, publish a public notice of the goals, and consider specified factors in determining the goals. 49 C.F.R. § 23.64(e) (incorporating by reference 49 C.F.R. § 23.45(g) [as amended at 52 Fed. Reg. 39280]). If the goal is less than 10%, the state must request a waiver of the requirement. Prior to requesting a waiver, the state must consult with private groups that might have relevant information, must ensure that the governor of the state concurs in the request, and must justify its lower goal by documenting its efforts to locate disadvantaged businesses, to make

disadvantaged businesses aware of the program, to encourage and develop disadvantaged businesses, to overcome any legal or other barrier impeding participation, and by explaining the unavailability of disadvantaged businesses, and the characteristics of the minority population in the state and their effects on availability. 49 C.F.R. § 23.64(e), 49 C.F.R. § 23.65. The 10% requirement will be waived if the Administrator of the Federal Highway Administration determines that the state is making all appropriate efforts to increase participation of disadvantaged businesses and that the proposed goal represents a reasonable expectation of participation. 49 C.F.R. § 23.66(b). The regulations also set out the procedures the state must follow to allow third party challenges to determinations that particular businesses qualify as economically and socially disadvantaged. 49 C.F.R. § 23.69. Failure to comply with any of these requirements subjects the state to loss of all its federal highway funding. 49 C.F.R. § 23.68.

49 C.F.R. § 23.45(k) contains an optional method of compliance.

> Where not prohibited by state or local law and determined by the recipient to be necessary to meet MBE [Minority Business Enterprise] goals, procedures to implement MBE set-asides shall be established. MBE set-asides shall be used only in cases where at least three MBEs with capabilities consistent with contract requirements exist so as to permit competition.

The section is authorized by § 106(c) of the 1987 Act. *See* 49 C.F.R. § 23 (citation to authority under which regulation was promulgated) [as amended by 52 Fed. Reg. 39229].[5]

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[5] It is not entirely clear how the Department of Transportation has determined that the set-aside procedure is authorized by the 1987 Act. The regulation was originally promulgated as part of a regulatory affirmative action program adopted prior to 1982 under

In order to ensure that it continues to receive federal highway funds, the State of Wisconsin enacted a general disadvantaged business program that conforms exactly to the federal requirements and has compiled with all the requirements. Wisconsin experienced some problems in the implementation of the general program. Non-disadvantaged prime-contractors complained to the Wisconsin Department of Transportation about the inability of disadvantaged businesses to perform satisfactorily. Disadvantaged businesses complained to the department

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the authority of a variety of transportation acts, Title VII of the Civil Rights Act of 1964, and Executive Order 12138. *See* 49 C.F.R. § 23 (citation to authority under which regulation was promulgated). At least two courts have found these cited authorities to be insufficient and have held that the regulation does not reflect Congress' intent and cannot be validated by reliance on congressional findings. *See M.C. West, Inc. v. Lewis*, 522 F. Supp. 338 (M.D.Tenn. 1981); *Central Alabama Pavers, Inc. v. James*, 499 F. Supp. 629 (M.D.Ala. 1980). *Cf. S.J. Groves & Sons Co. v. Fulton Co.*, 696 F. Supp. 1480 (N.D.Ga. 1987) (Federal Aviation Act provides authorization for set-asides in airport construction).

When the Surface Transportation Assistance Act of 1982 was enacted, the department did not consider the Act to be statutory authorization for the section. Furthermore, the regulations implementing the 1982 Act, 49 C.F.R. § 23.63 (1987) and Appendix A to 49 C.F.R. § 23, subpart D (1987), make clear that § 23.45(k) did not apply to the disadvantaged business program created by that Act. Following the enactment of the 1987 Act the department revised the statutory authorization citation for § 23 to include the 1987 Act as authorization for the entire section, including § 23.45 (k). *See* 52 Fed. Reg. 39229. However, the revision as it appears in the Federal Register does not indicate the basis for the change or how to reconcile the current inconsistency between § 23.45's use of the term minority and the 1987 Act's use of the term "disadvantaged."

Although these are issues that might merit further attention at a later stage of this litigation, I do not think that they substantially affect the analysis of the constitutionality of the state program. Even if § 23.45 does not provide direct authorization of a set-aside program, direct authorization may not be necessary since the program is only a means of implementing the Congressional intent motivating the 1987 Act.

about their inability to compete with non-disadvantaged businesses for prime contracts because of economic barriers they have encountered. Furthermore, the department has independently determined that the paucity of disadvantaged prime contractors hinders the department's successful implementation of the federal program. More than 90% of the disadvantaged firms that have participated in the program have been subcontractors working under prime contractors. The 10% goal may be met by the participation of disadvantaged businesses as prime contractors or as sub-contractors. However, when a disadvantaged business is a prime contractor the entire dollar amount of the contract is counted toward the 10% goal even if portions are subcontracted to non-disadvantaged businesses. When a disadvantaged business is a sub-contractor only the dollar amount of the sub-contract may be counted toward the goal. Thus, it is more efficient for the state to meet its goal by using disadvantaged businesses as prime contractors.

In order to remedy these problems in the implementation of the requirements of section 106(c), the Wisconsin legislature enacted the contested disadvantaged business demonstration and training program. Wis. Stat. § 84.076 provides that $4 million of funds appropriated for highway contruction shall be allocated to projects that may be bid on only by disadvantaged prime contractors. The set-aside is only one aspect of the program, albeit the contested aspect. The statute includes comprehensive provisions for training disadvantaged individuals and businesses in order to remedy the problem the state has identified with its current implementation of the federal program: that most disadvantaged businesses currently are unable to obtain prime contracts. It provides management and technical assistance to disadvantaged businesses so that they are better equipped to bid for prime contracts, and it mandates preapprenticeship training of disadvantaged individuals so that more may enter the construction trade. Wis. Stat. § 84.076(4). Further-

more, as is appropriate for a demonstration and training program, the program is of limited duration and expires June 30, 1991.

In most respects, the contested statute is fully integrated in Wisconsin's implementation of section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act. The state statute adopts federal definitions and criteria and federal funds expanded under the statute count towards compliance with the federally mandated 10% goal. Since the enactment of the statute, the state has authorized the letting of four projects under it. These projects were approximately 75% federally funded. Thus, 75% of the total amount of funds expended with disadvantaged businesses under the contracts counted towards the state's 10% goal.

However, it must be noted that $4 million that the state must allocate each year for use under the statute need not be from federal sources. The monies allocated may be state or local funds. As noted above, monies allocated thus far have been approximately 75% from federal sources and 25% state and local sources. Defendants have stated in their brief, although they have not supported the statement with any evidentiary materials, that the allocation can never consist totally of federal funds because the federal authorizing statute requires some matching state funding for every project. However, there is no indication that in the future the allocaiton could not be entirely or primarily from state and local sources.

The following discussion of the integration of the state and federal programs and the constitutionality of Wis. Stat. § 84.076 is premised on the fact that most of the monies allocated for use under the statute have been federal and will count towards Wisconsin's compliance with the federal 10% goal. The same analysis and conclusions would not apply if the monies were not primarily federal and were not counted toward the 10% goal. Then the

state program would be more akin to a state program modeled on a federal program than one implementing and subsidiary to a federal program. Such a program probably would not be constitutional in the absence of finding of past discrimination as discussed in my previous opinion.[6] Accordingly, although I conclude that plaintiffs are unlikely to succeed on their claim that the contested statute is unconstitutional as it has been applied, it does not appear that the statute could survive intact a facial challenge, and thus I decline to hold that plaintiffs would be unlikely to show that is unconstitutional on its face and must be narrowed.

Insofar as the contested statute is analyzed as it has been applied thus far, the integration of the federal and state programs is essentially total. The definitions of small business and disadvantaged individual are identical to those used in the Act, in the implementing regulations, and in Wisconsin's other disadvantaged business program. *Compare* Wis. Stat. §§ 84.076(1)(b), 84.076 (3)(c), 506.035(1)(e)1 and 49 C.F.R. §§ 23.62; 15 U.S.C. § 637(d) (the Small Business Act).[7] The con-

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[6] I do not address here what percentage of the $4 million allocated under the statute or expended on a particular project must be federal for the program or statute to be deemed primarily federally funded. Projects that receive 70-75% of their funding from federal sources, such as the ones the state currently plans to let under the program, are primarily federally funded. I express no opinion whether projects receiving a lesser percentage of federal funds are primarily federally funded or whether the requirement of federal funds are primarily federally funded or whether the requirement of primarily federal funding applies to the total $4 million allocation, the allocation for each individual project, or both.

[7] In my previous opinion I indicated that the definition of minority in Wis. Stat. § 84.076 differed from the federal definition because the state included persons from Burma, Thailand and Portugal while the the federal program did not. *Citing* 49 C.F.R. § 23, Appendix A (analysis of § 23.62). However, I had neglected to consult the 1987 changes in the regulations which show that those persons are now included in the federal definition as well. *See* 49 C.F.R.

tested statute adopts the same criteria for determining who is socially and economically disadvantaged and how that determination may be contested. Those who are eligible for the program are drawn from the same directory of disadvantaged businesses the state compiles under the federal regulation. Disadvantaged businesses must provide the same information and meet the same qualifications to be eligible for the demonstration and training program and the state's more general disadvantaged business program (with the exception that to participate in the challenged program disadvantaged businesses must show that they have the requisite experience and financial resources to be a prime contractor). The programs are administered together. Expenditures of federal funds under the contested program are to be counted towards the state's general 10% goal. Thus, most of the expended funds count towards that goal. The projects that have been designated to be let under the program are part of the Federal-Aid Urban System of Federal-Aid Primary System of highways. The Federal Highway Administration considers the contested program to be one component of the state's program of compliance.

Furthermore, set-aside programs such as Wisconsin's are explicitly permitted under 49 C.F.R. § 23.45(k) as a method of implementing § 106(c) of the 1987 Act. In order to adopt a set-aside program under § 23.45(k) the state must determine the program to be necessary in order to meet its 10% goal and must ensure that at least three qualified business are available to bid. The state has determined the program to be necessary. The state received complaints from disadvantaged businesses that they faced barriers to becoming prime contractors. It also determined that it could meet its 10% goal more efficiently if it could use more disadvantaged prime contractors.

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§ 23, Appendix A (analysis of § 23.62) [as amended at 52 Fed. Reg. 39231].

The fact that Wisconsin exceeded its 10% goal in 1987 and was projected to exceed that goal in 1988 does not prevent the state from choosing to adopt the set-aside under § 23.45(k). First, Wisconsin may choose a more efficient method of reaching its goal, particularly if, as here, the state believes that the chosen method will enhance its overall implementation of the federal statute by improving the ability of disadvantaged businesses to participate equitably in the federally mandated program. Second, Congress has made clear that the 10% goal is a minimum and not a maximum. *See* H. Conf. Rep. No. 100-27, 100th Cong., 1st Sess. (Joint Explanatory Statement of the Committee of Conference) (1987).

Where, as in this case, a state program is enacted to implement federal legislation imposing specified requirements on the state and the legislation is an integral part of the federal-state legislative framework, the state program should be considered a subsidiary element of the federal legislation. The Supreme Court reached that conclusion in *Fullilove* where it addressed the affirmative action program enacted by the Public Works Employment Act of 1977. 448 U.S. 448. As discussed earlier, the Act, like the Surface Transportation and Relocation Assistance Act of 1987, required that state recipients of federal funds authorized by the Act expend 10% of the funds with minority businesses. In a plurality opinion the Court held that Congress could impose that requirement on the states under its expansive powers even if the states could not constitutionally enact similar legislation on its own initiative. *Id.* at 473-48. *See also id.* at 515-16, n.16 (Powell, J., concurring) *Croson*, 57 U.S.L.W. at 4137-8 (interpreting *Fullilove*).

The Court appeared to base its holding primarily on § 5 of the Fourteenth Amendment and on the spending power. The Fourteenth Amendment grants Congress power to enact race-conscious remedial legislation and to regulate the procurement practices of state recipients of

federal funds. 448 U.S. at 476-77. Use of the Spending Power is a traditional method of imposing such requirements on states:

> Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld aaginst constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy.
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> * * * *
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> Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment. We conclude that in this respect the objectives of the MBE provision are within the scope of the Spending Power.

Id. at 474, 478.

In *Fullilove* the plaintiffs challenged the federal act and not the state implementing legislation. However, the Court's analysis suggests that the state implementing legislation was constitutional as well. If Congress can require states to comply with race-conscious requirements, state legislation enacted to create the means of fulfilling those requirements must also be permitted. As I noted in the earlier opinion entered in this case, a district court examining a state law implementing the Surface Transportation Assistance Act of 1982 and 49 C.F.R. § 23 has come to a similar conclusion. *Carpenter v. Dole*, slip op. 85-527-CIV-5 (E.D.N.C. March 6, 1987). In that case the court pointed out that the state plan was not a state program, "but rather is the final step in the implementation of a congressionally created federal remedial action. *Id.* at 22.

Recently, the Supreme Court has reiterated this vision of Congress' ability to impose requirements on the states.

In *North Dakota v. Dole*, 107 S. Ct. 2793 (1987), the Court upheld federal legislation that conditioned receipt of federal highway funds on the enactment of state laws permitting sale of alcohol only to persons over the age of twenty-one. Citing *Fullilove*, the Court held that Congress may attach conditions to the receipt of federal funds so long as those conditions are not unconstitutional and are in the general interest as Congress defines that interest. *Id.* at 2795-8. Similarly, in *Papason v. Allain*, 478 U.S. 267 (1985), the Court noted that where Congress requires a state to undertake certain actions, the relevant inquiry is whether the federal policy is constitutional. If it is and if the state is bound to adhere to that policy, the state's action is constitutionally permissible. *Id.* at 289.

Contrary to plaintiffs' assertions, this analysis does not apply only when the state has no choice but to adhere to the federal requirements. Here the state could choose to forgo federal highway funding. Furthermore, it could attempt to receive a waiver of the mandated 10% goal. Finally, the state enjoys limited discretion in deciding how to achieve the 10% goal and to exceed the goal if it can. I find unconvincing the argument that because the state can choose to give up over $200 million dollars in federal highway funding its compliance is discretionary. In *Fullilove* and in *North Dakota v. Dole* the states enjoyed the "option" of forgoing federal funds and in *Fullilove* the states could request a waiver of compliance. The Supreme Court did not consider these factors relevant in its determination; neither do I. The fact that the state need not implement a set-aside program to reach its 10% goal if it can reach it otherwise also does not indicate that the program should not be considered an extension of congressional legislation. That Congress gives states optional methods of compliance does not mean that compliance is not required and that the state does not need to undertake the available steps most suited to ensuring compliance.

2. *Congressional Findings*

Because the Wisconsin disadvantaged business demonstration and training program challenged in this lawsuit is properly considered a subsidiary element of the federal legislation, the state may rely on the congressional findings underlying the federal legislation. *See Carpenter*, slip op. at 23 (there is no authority for the position "that a state agency must enter independent specific findings of past state governmental discrimination in order for its voluntary participation in a congressionally enacted remedial program to pass constitutional muster.")

The Supreme Court's decision in *Croson* is not to the contrary. In *Croson*, the Court held that state and local laws employing racial and ethnic classifications must be supported by specific evidence of discrimination in that state or locality against those aided by the statute. 57 U.S.L.W. at 4140-43. The City of Richmond could not rely on congressional findings of nationwide discrimination in the construction trade because "Congress explicitly recognized that the scope of the problem would vary" across the nation. 57 U.S.L.W. at 4142. The contested Wisconsin program is not a purely state program. It is a subsidiary element of the federal nationwide Surface Transportation and Uniform Relocation Assistance Act of 1987. Thus, *Croson*'s evidentiary requirements are inapplicable. Federal statutes and their subsidiaries are properly supported by congressional findings of nationwide discrimination. *Cf. Fullilove*, 448 U.S. 448 (suggesting that state statutes implementing affirmative action program of the Public Works Employment Act are properly supported by the congressional findings of nationwide discrimination underlying the Act).

However, it is necessary to examine the congressional findings underlying the Surface Transportation Act of 1982 and the Surface Transportation and Uniform Relocation Assistance Act of 1987 to determine whether they

provide an adequate showing of past discrimination justifying the enactment of the federal program which the contested Wisconsin statute implements.[8] When enacting race-conscious legislation, Congress is not constitutionally required to make the specific findings of past discrimination that states and local governments must make. In *Fullilove*, the plurality looked first to the legislative history of the Public Works Employment Act of 1977 to determine whether Congress had before it sufficient evidence of past discrimination in the construction industry to justify passage of the race-conscious legislation. 448 U.S. at 463. The Act included no explicit findings of past discrimination. *Id.* at 478. However, the Court did not require such findings. Instead, the plurality opinion emphasized that the legislation "must be considered against the background of ongoing efforts directed towards deliverance of the century-old promise of equality of economic opportunity." *Id.* at 463. As Justice Powell wrote in his concurrence:

> Congress is not expected to act as though it were duty bound to find facts and make conclusions of law. The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding. Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation.

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[8] Of course, the constitutionality of the federal legislation is not at issue here. I consider the findings supporting the federal acts only to determine whether they provide a constitutionally sufficient foundation for the challenged Wisconsin law.

> After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

Id. at 502-03.

The Supreme Court in *Croson* addressed the constitutionality of a local minority preference and thus did not explicitly consider what evidentiary requirements the Fourteenth Amendment imposes on Congress. However, three members of the majority implicitly reiterated the holding of *Fullilove* that Congress may address societal discrimination without making specific findings of past discrimination. 57 U.S.L.W. at 4237-8 (states must make specific findings expressly because states enjoy fewer remedial powers than Congress and thus must do *more* than Congress to justify race-conscious remedial legislation).

One court of appeals has suggested that *Croson* might have increased the evidentiary requirements Congress must meet. In *Shurberg Broadcasting of Hartford, Inc. v. Federal Communications Commission*, slip op. 84-1600 (March 31, 1989), the Court of Appeals for the District of Columbia Circuit struck down a federal minority preference. The separate opinions by the two judges in the majority did not focus on what evidentiary requirements Congress had to fulfill because both found the federal program unconstitutional on the ground that it was not narrowly tailored. However, in dicta Judge Silberman suggested that the congressional findings the Supreme Court considered in *Fullilove* were the minimum necessary to satisfy the Constitution. *Id.* at 26 ("I do not read the Court's dicta in *Croson* to mean that Congress may act without *some* quantum of particularized evidence of the effects of societal discrimination in the relevant industry, and in that regard the general findings of minority underrepresentation in the broadcasting field

differ, in my view, from the congressional findings the Court encountered in *Fullilove*.").

I do not agree that the Supreme Court's decision in *Croson* necessitates a revision of the evidentiary standards imposed on Congress or a holding that the evidence Congress had before it in *Fullilove* was the minimum that is constitutionally acceptable. *See also Shurberg*, slip op. at 13-15 (Wald, J., dissenting). However, a determination of the question is not necessary for the resolution of this motion because the legislative context and history of the Surface Transportation Assistance Act of 1982 and the Surface Transportation and Uniform Relocation Assistance Act of 1987 show that Congress had before it adequate evidence of past discrimination in the construction trade to meet the evidentiary requirements established in *Fullilove*.

What became the affirmative action provision of the 1982 Act, § 105(f), was introduced on the House floor as an amendment by Representative Parren Mitchell and was adopted without debate by a voice vote. 128 Cong. Rec. 28927 (December 6, 1982). Representative Mitchell had also sponsored the essentially identical affirmative action provision of the Public Works Employment Act addressed in *Fullilove*. Introducing the amendment to the Surface Transportation Assistance Act, he referred explicitly to the Public Works Employment Act provision and the Supreme Court decision upholding its constitutionality and stated that the current amendment attempted to remedy the same problems as those identified by the earlier legislation. *Id.* No comparable provision was introduced in the Senate. The conference report adopted the amendment as introduced, except that it added the introductory phrase, "Except to the extent the Secretary determines otherwise." *See* 48 Fed. Reg. 33432 (reviewing legislative history of Act). This additional language permitting waivers was consistent with the wording and application of the Public Works Employment Act.

The Surface Transportation and Uniform Relocation Assistance Act of 1987, the Act currently in effect, includes a version of § 105(f) of the 1982 Act (it adds women as a disadvantaged group, refines the definition of small business, and imposes additional, uniform criteria on states). Pub. L. 100-17 § 106(c). Between the enactment of the two authorization bills, Congress held several hearings evaluating the success of the 1982 Act and gathering data in preparation for reauthorization of federal highway funding in the 1987 Act. *See, e.g.*, Review of the Implementation of the Surface Transportation Assistance Act of 1982: Hearings Before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation, 98th Cong., 1st Sess. (1983); The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act: Hearings Before the Subcommittee on Transportation of the Senate Committee on Environment and Public Works, 99th Cong., 1st Sess. (1985); The Federal-Aid Highway Program: Hearings Before the Subcommittee on Transportation of the Senate Committee on Environment and Public Works, 99th Cong., 1st Sess. (1985); Extension of the Nation's Highway, Highway Safety, and Public Transit Programs: Heairngs Before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation, 99th Cong., 1st Sess. (1985).

A preliminary review of these hearings does not reveal extensive testimony documenting past discrimination in the construction industry. However, Representative Mitchell testified at two of these hearings as to the general need for the provision and referred explicitly to hearings by the House Subcommittee on Small Business documenting the need for remedial measures. *See* Senate Hearing on the Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act at 5-6; House Hearing on Extension of the Nation's Highway Programs at 1350-54

("Mr. Chairman, I offer for your information and files the [numerous] items presented to the Subcommittee on SBA and SBA Authority, Minority Enterprise and General Small Business Problems."). Furthermore, the Senate Committee Report on the 1987 Act stated that "[t]he Committee has considered extensive testimony and evidence on the bill's DBE provision, and has concluded that this provision is necessary to remedy the discrimination faced by socially and economically disadvantaged persons attempting to compete in the highway and mass transit construction industry." S. Rep. No. 100-4, 100th Cong., 1st Sess. (1987).

As this review shows, when Congress enacted the disadvantaged business provision currently in effect, it had before it the legislative history of the Public Works Employment Act of 1977 and relied upon that history explicitly. It has already been determined that the evidence underlying that Act met constitutional standards, *Fullilove*, 448 U.S. at 453-67, and that Congress may rely on information and expertise gained from the consideration of one bill when it enacts similar legislation later. *Id.* at 463-67, 502-03. Thus, Congress could rely on the findings underlying the Public Works Employment Act of 1977 when it enacted virtually identical provisions in the Surface Transportation Assistance Act of 1982 and the Surface Transportation and Uniform Relocation Assistance Act of 1987. The hearings and Senate committee report preceding the enactment of the 1987 Act provide further evidentiary support for the legislation. Thus, when the legislation is seen in context, it is clear that Congress had before it ample evidence of past discrimination in the construction trade and could constitutionally enact race-conscious remedies and impose them upon the states.

3. *Scope of Legislation*

To pass constitutional scrutiny, the means employed by race-conscious remedial federal legislation must be tai-

lored to the problem that has been identified.[9] *Fullilove*, 448 U.S. 485-89, 510-14. To determine whether that requirement has been met here, I will first examine the scope of the federal legislation and the general Wisconsin disadvantaged business program that implements it. I will then consider whether the set-aside provision of the contested Wisconsin statute is sufficiently narrow.

The Supreme Courts decisions in *Bakke*, *Fullilove*, *Wygant*, and *Croson* do not develop an explicit analytical framework for determining whether a program is narrowly tailored and instead consider on an *ad hoc* basis the elements of the program contested in each case. *See University of California Regents* v. *Bakke*, 438 U.S. 265, 315-19 (1978); *Fullilove*, 448 U.S. at 481-89; *Wygant*, 476 U.S. at 279-93; *Croson*, 57 U.S.L.W. at 4142-43. In the recent *Shurberg* decision, the Court of Appeals for the District of Columbia Circuit distilled two principles from these cases: to be narrowly tailored a program must be reasonably related to the interests it seeks to vindicate and must not unduly burden innocent non-minorities. *Shurberg*, slip op. at 2 (per curiam); *see also id.* at 27 (Silberman, J.) (the concept of narrowly tailored contains three elements: that the degree of preference be tied to effects of past discrimination; that there have been prior consideration of race-neutral alternatives; and that there be no unfair burden on innocent nonminorities); *id.* at 6 (MacKinnon, J.) (to be narrowly tailored a program must bear some relationship to the identified government interest and must minimize the burden on

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[9] Although the plurality opinion in *Fullilove* uses the term "narrowly tailored," 448 U.S. at 480, the required fit between ends and means is not as demanding as that in later cases in which the Court has required that programs adopted by local governments must be "narrowly tailored," *Croson*, 57 U.S.L.W. at 4142-3; *Wygant*, 467 U.S. at 279-84. In his concurring opinion in *Fullilove*, Justice Powell articulates the test as a requirement that the means selected be "equitable and reasonably necessary." *Id.* at 510. This formulation seems to reflect more accurately what has been required of congressional, as opposed to other, programs.

innocent nonminorities). This framework is helpful for analyzing the statutes at issue in this case.

The factors the Court considered in *Fullilove* fit within this framework. Both the plurality opinion and Justice Powell's concurrence noted particular aspects of the Public Works Employment Act of 1977 that limited its scope to ensure that it was reasonably related to the interests Congress sought to vindicate. The minority preference was adopted only after other remedies had failed. *Id.* at 463-68, *id.* at 511 (Powell, J., concurring). The Act operated prospectively only. *Id.* at 481. It permitted a waiver of the Act's ten percent goal if states could show that their best efforts could not succeed in meeting the goal. *Id.* at 487-89; *id.* at 514 (Powell, J., concurring). The use of racial and ethnic criteria was based on rebuttable presumptions that ensured that only disadvantaged businesses would be aided by the legislation. *Id.* at 489. The percentage chosen as a goal was not unreasonable. *Id.* at 513 (Powell, J., concurring). The Act included a complaint procedure to ensure that only bona fide minority firms were eligible. *Id.* at 482. And finally, it was a pilot project of limited duration and subject to congressional review before re-enactment. *Id.* at 489; *id.* at 513 (Powell, J., concurring). Justice Powell's concurrence also emphasized that the percentage goal involved a minimal amount of all construction work in the nation and thus would not excessively burden innocent nonminorities. *Id.* at 514-15 (Powell, J., concurring).

Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 was deliberately modeled on the legislation considered in *Fullilove*. S. Rep. No. 100-4, 100th Cong., 1st Sess. 11 (1987). The federal program it creates and the state's general disadvantaged business program implementing it thus contain virtually all the limitations the Court identified in *Fullilove*. They operate prospectively. A waiver is avail-

able. The criteria of eligibility are rebuttable, thus assuring that only minorities who are economically disadvantaged may participate in the program.[10] The program has a procedure by which third parties may challenge the eligibility of certified firms. The state program also is of limited duration, expiring in 1990. Finally, the percentage chosen is the same as that upheld in *Fullilove*.[11] Because the program includes these elements, its scope is sufficiently tailored.

The contested Wisconsin statute is intended to improve the state's implementation of the federal program. It is narrowly tailored to meet that end and thus is also narrowly tailored to remedy the discrimination Congress has identified. The challenged statute ensures that the minority preference is reasonably related to achieving state and federal goals by incorporating all of the limitations identified above with the exception of the reason-

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[10] The earlier conclusion that plaintiffs were likely to succeed on their claim that the contested statute violated the equal protection clause hinged on the determination that the racial and ethnic classifications in the statute are not rebuttable. A person of an enumerated racial or ethnic group is irrebuttably presumed to be socially disadvantaged.

However, as in *Fullilove*, such a person is not irrebuttably presumed to be economically disadvantaged. *Fullilove* addressed a minority business program. Unlike the program at issue here, it did not attempt to use racial and ethnic categories as a means of defining social disadvantage. Thus the question of whether a member of an ethnic or racial minority was irrebuttably presumed to be socially disadvantaged did not arise. Under that program a minority could be found to be ineligible only if he or she was not economically disadvantaged. The same is true of the statute challenged in this case. Thus, the criteria applied under this statute are rebuttable to the same extent that the criteria in *Fullilove* were rebuttable.

[11] The parties have not informed the court of the total amount of construction in the State of Wisconsin. However, it is likely that 10% of the federal highway aid ($19.5 million in fiscal year 1989) is not an excessive proportion of that amount.

able percentage goal.[12] The statute does not establish a goal. Rather it sets aside $4 million annually to be used in construction projects for which only "disadvantaged" businesses may bid. This distinction does not render the statute impermissibly over-inclusive. The state has determined that it can more efficiently and equitably implement the federal program if it encourages the development of disadvantaged prime contractors. The statute does this by setting aside a reasonable portion (approximately 25%) of the federal funds it expends to meet the federally mandated 10% goal. Moreover, the set-aside is not the only method used to meet the federal goal; rather it is a limited alternative to the general disadvantaged business program. Finally, the set-aside itself is only one element of the well-designed training program enacted in Wis. Stat. § 84.076 intended to improve the business skills of disadvantaged businesses.

The program also meets the second indicia of a narrowly tailored program because it remedies the identified problem without unduly burdening innocent nonminorities. Only $4 million of a total highway construction budget of approximately $300-350 million, or less than 1.5% of the total construction budget, is at issue. Nonminority contractors as a group are not injured because 98.5% of the state's construction business is still available to them. Furthermore, the nonminority contractors have prospective opportunities in the private sector. Nor are individual nonminority contractors unduly burdened. There has been no showing that the projects let under the contested statute have particular characteristics that make them invaluable to an individual contractor. *Cf. Shurberg*, slip op. at 31 (plaintiff lost "unique" opportunity to be awarded at a comparative hearing a liscence for a particular station in a limited market); *id.* 14-17 (MacKinnon, J.) (plaintiff's

[12] Wis. Stat. § 84.076 is repealed by its own terms effective June 30, 1991.

loss was more equivalent to the layoff's considered in *Wygant* than the lost contracting opportunities considered in *Fullilove*). For these reasons, I find that the contested statute is narrowly tailored to better implement the federal disadvantaged business program and to achieve the problem Congress has identified: discrimination in highway construction.

4. *Modification of the Injunction*

Defendants have asked this court to dissolve the preliminary injunction previously entered. The Court of Appeals for the Seventh Circuit has stated the standard for dissolution of an injunction as follows:

> Is the irreparable harm to the plaintiff if the injunction is dissolved, weighted by the probability that dissolution would be a mistake because the plaintiff would go on to win at trial, greater or less than the irreparable harm to the defendant if the injunction is not dissolved, weighted by the probability that allowing the injunction to continue in force would be a mistake because the defendant, not the plaintiff, will win at trial?

Centurion Reinsurance Co., Ltd. v. Singer, 810 F.2d 140, 143 (7th Cir. 1987).

The foregoing discussion shows that insofar as the contested Wisconsin statute allocates primarily federal funds to be set-aside for primarily federally funded projects, it is the subsidiary of a federal program, it is supported by adequate findings of past discrimination, and it is narrowly tailored. However, insofar as the statute permits the allocation of funds that are not primarily federal or projects that are not primarily federally funded, it cannot be considered part of the federal legislation and thus suffers the constitutional defects discussed in the previous opinion in this case. Due to this revision in my view of the merits of plaintiffs'

constitutional challenge, it now appears unlikely that they will succeed in a challenge to the constitutionality of the statute as it is applied. However, they are likely to succeed in a facial challenge to that portion of the statute authorizing state and local funding in unspecified percentages and amounts.

Because I find that plaintiffs are still likely to succeed on merits of a facial challenge, dissolution of the injunction is not warranted. However, because I now find that plaintiffs are unlikely to succeed in a challenge to the state's current application of the statute, it is appropriate to consider whether the injunction should be modified to permit plaintiffs to implement the statute through the use of primarily federal funds. Although the decision to modify an injunction is less far-reaching than a decision to dissolve it, the relevant considerations are generally the same. Thus, I will apply the standard for granting a motion to dissolve an injunction articulated in *Centurion Reinsurance* to determine whether modification is proper.

In the decision granting plaintiffs' motion for a preliminary injunction, I found that the balance of harms weighed in favor of enjoining the operation of the statute. In particular, I found that the violation of plaintiffs' constitutional rights constituted irreparable harm and that the injunction of an unconstitutional statute was in the public interest. However, the analysis was premised on the assumption that the statute was unconstitutional.

Defendants have since shown that the statute as it has been applied is an elaboration of a federal law and that it should be found to be constitutional under the standards of analysis applied to federal statutes. Thus, plaintiffs can no longer contend that they will be irreparably harmed by the violation of their constitutional rights or that the injunction is in the public interest. Plaintiffs may suffer monetary loss if the decision to

modify the injunction is mistaken. However, enjoining a state statute is a strong remedy and should be imposed sparingly. Where, as here, the plaintiffs' likelihood of success on the merits of its challenge to the application of the statute is slim, the plaintiffs will suffer only a speculative loss at most (profits that would have been earned if a particular plaintiff, of the many plaintiffs in this suit, had won a contract that now will go to a disadvantaged contractor), and the injunction of the statute as it has been applied is not in the public interest, modification of the injunction is proper.

ORDER

IT IS ORDERED that the order entered February 27, 1989 is modified to read as follows:

Defendants are enjoined from letting under Wis. Stat. § 84.076 contracts for any projects that are not funded primarily with federal funds. Defendants are not enjoined from executing the three contracts already let under Wis. Stat. § 84.076 or from letting under the statute other contracts for projects funded primarily with federal funds.

Entered this 7 day of April, 1989.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

Signed at the direction of Judge Crabb who is outside the district.

/s/ Joseph W. Skupniewitz
JOSEPH W. SKUPNIEWITZ
Magistrate

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

89-C-0177-C

MILWAUKEE COUNTY PAVERS ASSN., a Wisconsin corporation, B.R. AMON & SONS, INC., a Wisconsin corporation, BARRICADE FLASHER SERVICE, INC., a Wisconsin corporation, RODDIE BEAUDOIN & SON CO., a Wisconsin corporation, BOULANGER CONST. CO., INC., a Wisconsin corporation, BRINKMANN ENGINEERING, INC., a Wisconsin corporation, JAMES CAPE & SONS CO., a Wisconsin corporation, CENTURY FENCE, a Wisconsin corporation, EARTH, INC., a Wisconsin corporation, HANZ CONTRACTORS, INC., a Wisconsin corporation, JOHNSON SAND & GRAVEL, INC., a Wisconsin corporation, TOM KUEHNE LANDSCAPE CONTRACTOR, INC., a Wisconsin corporation, LA LONDE CONTRACTORS, INC., a Wisconsin corporation, MILWAUKEE GENERAL CONSTRUCTION CO., INC., a Wisconsin corporation, A.E. OAKES, a Wisconsin corporation, PAC-SAC CONSTRUCTION, a Wisoensin corporation, PAVING MIX & CONSTRUCTION, a Wisconsin corporation, PHEIFER BROS. CONST. CO., INC., a Wisconsin corporation, RELIANCE CONSTRUCTION CO., INC., a Wisconsin corporation, ROCK ROAD OF WISCONSIN, INC., a Wisconsin corporation, STOEHR GRADING CO., INC., a Wisconsin corporation, SUPER EXCAVATORS, INC., a Wisconsin corporation, TRIERWEILER CONST. & SUPPLY CO., INC., a Wisconsin corporation, VINTON CONSTRUCTION CO., a Wisconsin corporation, and ZIGNEGO COMPANY, a Wisconsin corporation, on behalf of themselves and all similarly situated persons,

Plaintiffs,

v.

RONALD R. FIEDLER, individually and in his capacity as Secretary of the Wisconsin Department of Transportation, and DAVID MANNING, individually and in his capacity as Wisconsin Department of Transportation Minority Business Programs Director,

Defendants.

ORDER

[Filed Feb. 27, 1989]

This is a civil action pursuant to 42 U.S.C. § 1983 in which plaintiffs challenge the constitutionality of Wis. Stat. § 84.076(1) and (2), entitled "Disadvantaged business demonstration and training program," which provides that the State of Wisconsin should reserve $4,000,000.00 in construction contracts for "disadvantaged" businesses.[1] Plaintiffs request (1) a permanent injunction against enforcement of the statute, (2) a temporary injunction enjoining bid lettings scheduled for February 21, 1989 and March 21, 1989 and execution of bids under the statute, and (3) a declaration that the statute is unconstitutional under the standards for reviewing affirmative action programs articulated recently by the United States Supreme Court in *City of Richmond v. J.A. Croson*, 57 U.S.L.W. 4132 (January 24, 1989).[2]

---

[1] Although it appears that plaintiffs wish to bring their suit as a class action, they have not yet made a formal motion for class certification. Accordingly, at this time plaintiffs are proceeding on their own behalf and not as representatives of any class.

[2] In addition, appearing as amici curiae arguing in support of the constitutionality of the statute are the Wisconsin Minority Contractors' Association, Bowles Contracting, Inc., Mews Companies, Inc., Lakeside Pavers, Inc., Payne & Dolan, Inc., Platt Construction, Inc., and Underground Pipeline, Inc. The last four listed companies have been awarded bids under the contested statute. *See Leigh v. Engle*, 535 F. Supp. 418 (N.D. Ill. 1982) (district court may grant leave to file amici brief where it deems brief timely and useful). Given the strong interest these entities have in the outcome of this case, I have considered the arguments in their brief.

Immediately upon filing, the court established a briefing schedule on plaintiffs' motion for a preliminary injunction. On February 20, 1989, after the plaintiffs had filed a brief in support of their motion but before defendants had replied, plaintiffs requested a temporary restraining order enjoining the bid letting scheduled for the following day. On February 21, 1989, the court held a hearing on the motion at which both sides argued and defendants presented two witnesses. At the conclusion of the hearing, the parties agreed that the court should consider the hearing and pending motion to be requesting a preliminary injunction in lieu of a temporary restraining order.[3] Defendants were given until noon on February 22, 1989 to submit affidavits and briefs in opposition to the motion for a preliminary injunction.

The State of Wisconsin is to be lauded for its efforts to ensure that businesses owned by disadvantaged people will enjoy equal business opportunities in the construction industry. The state has enacted a thoughtfully designed program that will train disadvantaged individuals and businesses in business skills and ensure that they will be able to obtain some state construction contracts. Unfortunately, legislation that is both wise and fair from the standpoint of public policy and morality is not always constitutional. In this case, the challenged Wisconsin statute, despite its worth, is constitutionally suspect. The statute appears to classify individuals on the basis of race, national origin, and gender. The state has not yet put forward the evidentiary showing necessary to find that the classifications are constitutional.

---

[3] A temporary restraining order is an injunction granted without notice to the adverse party and is limited to ten days' duration. Fed. R. Civ. P. 65(b). A preliminary injunction issues only after notice. Fed. R. Civ. P. 65(a)(1). Where the adverse party has received notice of a motion for a temporary restraining order and a hearing has been held on the motion, it is proper for the court to consider the motion as one for a preliminary injunction. 11 Wright & Miller, Federal Practice and Procedure § 2951.

Because I find that plaintiffs have a likelihood of success on the merits of their claim and because the other prerequisites to the granting of injunctive relief have been met, plaintiffs' motion for a preliminary injunction will be granted.

Based on the undisputed affidavits and exhibits submitted by the parties and the testimony at the hearing, I find as true the following material facts for the purpose of deciding this motion.

FACTUAL FINDINGS

Plaintiffs are highway contractors doing business in Wisconsin and qualified to bid on most of the Wisconsin Department of Transportation's highway construction projects. They may not bid on projects authorized by Wis. Stat. § 84.076 because they are not disadvantaged businesses as defined by the statute.

Defendant Fiedler is Secretary of the Wisconsin Department of Transportation. Defendant Manning is Disadvantaged Business Programs Director for the department.

In 1982, Congress enacted the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097, 2100. The Act required that each recipient of federal aid make reasonable efforts to award at least 10% of those funds to disadvantaged firms, that is, small firms owned and controlled by socially and economically disadvantaged individuals. The Act incorporated the definitions of social and economic disadvantage of section 8 of the Small Business Act, 15 U.S.C. § 637(d) and the regulations promulgated pursuant to it. 49 C.F.R. § 23.

In order to comply with the requirements of the Act, Wisconsin enacted a Disadvantaged Business Enterprise Program. As specified by the Act, the Wisconsin program determined which firms were disadvantaged according to the definitions and criteria established by 49

C.F.R. § 23 and then compiled a list of firms certified as disadvantaged.

Under 49 C.F.R. § 23.62, a firm is disadvantaged if it is small and is owned and controlled by individuals who are socially and economically disadvantaged. The regulation incorporates a presumption that citizens or permanent residents of the United States who are "Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans" are disadvantaged. 49 C.F.R. §§ 23.62, 23.69, appendix A (analysis of §§ 23.62 and 23.69). Other groups or individuals may establish economic and social disadvantage according to the procedures and criteria established in 49 C.F.R. § 23.62 and Appendix C.

All firms seeking to be certified by the state as disadvantaged firms must apply to the Wisconsin Department of Transportation. Each application must include, among other information, the type of equipment the applicants use, ownership of the equipment, experience, bank accounts, tax records, and ownership and management of the business. The department evaluates each application individually.

Currently, approximately 180 firms are certified as disadvantaged business enterprises. A business owned by a member of a group presumed to be disadvantaged is not automatically certified by the department. The business must prove that it satisfies the size and ownership and control requirements of 49 C.F.R. § 23.

Since 1982, the Department of Transportation has decertified or denied certification to 353 firms. Approximately 75% of those firms were decertified or denied certification because the department determined that they were "fronts" and were not actually owned and controlled by disadvantaged individuals. Most of the remainder were decertified or denied because they lacked the expertise or resources to operate successfully or they did not actively pursue the certification procedure and supply all the necessary information.

The assumption that a member of a listed minority group is socially and economically disadvantaged is rebuttable. Since 1982, approximately 300 firms have applied for certification and been rejected. Approximately half of the rejected firms were owned and controlled by women. Two prominent and wealthy Black athletes applied and were rejected because the department found that they were not economically disadvantaged. A Black person who did not appear to be Black and was not considered Black by others would not be found to be socially disadvantaged.

Approximately five firms that are not owned by individuals who are members of groups that are presumptively disadvantaged have applied for certification as a disadvantaged business. One of these firms has been found to be disadvantaged. The firm is owned and controlled by a white male disabled veteran of the Vietnam War.

The Wisconsin Department of Transportation spends approximately $300-350 million per year on its highway construction projects. For the past four years, approximately 10% of the construction funds were awarded to disadvantaged firms. More than 90% of the minority firms that have received state funds have been subcontractors working under non-disadvantaged prime contractors. Of the 1,364 prime contracts let for highway projects since 1984, only 67 have been awarded to disadvantaged firms. The non-disadvantaged prime contractors have complained to the department about the inability of the disadvantaged businesses to perform satisfactorily. Disadvantaged businesses have complained to the department about their inability to compete with non-disadvantaged businesses for prime contracts because of the economic barriers they have encountered.

To remedy these two problems, the Wisconsin legislature enacted the contested demonstration and training

program in 1988. 1987 Wisconsin Act 399, codified as Wis. St. § 84.076. The Act states, in relevant part: [4]

> *84.076. Disadvantaged business demonstration and training program.*
>
> *(1) Definitions.* In this section:
>
> (a) "Disadvantaged individual" means a minority group member, a woman or any other individual found to be socially and economically disadvantaged by the department as provided in 49 CFR 23.62, unless successfully challenged as provided in 49 CFR 23.69.
>
> (b) "Disadvantaged business" means a sole proprietorship, partnership, joint venture or corporation that fulfills all of the following requirements, as certified by this department:
>
> 1. Is at least 51% owned by one or more disadvantaged individuals who are u.S. [sic] citizens or persons lawfully admitted to the United States for permanent residence. . . .
>
> 2. Its management and daily business operations are controlled by one or more of the disadvantaged individuals who own it.
>
> 3. It is currently performing a useful business function as defined in s. 560.036(1)(h).
>
> (c) "Minority Business" has the meaning given under s. 560.036(1)(e)1.
>
> (d) "Minority group member" has the meaning given under s. 560.036(1)(f).
>
> *(2) Administration.* (a) The secretary shall administer a demonstration and training program for the purpose of developing the capability of disadvantaged businesses to participate in construction

[4] The training aspects of the program contained in § 84.076(3) and (4) have not been challenged in this action.

> projects funded under [specified sections]. Beginning in fiscal year 1988-89—the secretary shall allocate $4,000,000 each fiscal year for the awarding of contracts under this section. The secretary shall attempt to ensure that 75% of the amount so allocated each fiscal year is for the awarding of contracts under this section to minority businesses. The secretary may award 100% of the amount so allocated each fiscal year to one disadvantaged business.
>
> * * * *
>
> *(3) Bids, contracts.*
>
> . . . The secretary shall establish a list of disadvantaged businesses that are eligible to submit bids for contracts awarded under this section. . . .

The program is in effect only through June 30, 1991. The Department of Transportation plans to audit the program prior to its termination to evaluate its success.

The Department of Transportation hired two firms to manage the projects and develop training requirements. In written materials sent to prospective bidders these firms used the term "minority" businesses, not "disadvantaged" businesses. The department wrote to all potential bidders advising them that in their bid proposals they must change the term "minority" to "disadvantaged" or risk rejection of the bid.

The projects initiated under the program have been targeted in the southeastern portion of the state because of the availability of certified disadvantaged firms in that area. Once the projects were selected, the department informed all certified disadvantaged firms about the program. The department also advertised the existence of the program.

The standards and procedures used to determine which individuals and firms qualify as disadvantaged under § 84.076 are identical to those the state has been using to comply with the Surface Transportation Act.

Under the department's bid letting procedure, advertisements of the bid letting are placed and all disadvantaged firms are notified approximately two months prior to the bidding date. Plans of the projects to be bid are released approximately one month prior to the bidding date. Bids are let the third Tuesday of each month. If the department receives no satisfactory bid on a project, it will relet the bid at a subsequent date.

On January 6, 1989, the department issued a notice of bid opportunities identifying four state highway projects on which only disadvantaged business enterprises could bid individually as a prime contractor. Nine disadvantaged firms were qualified as competent to bid on the projects. Three of these firms were joint ventures. On February 21, 1989, the department let bids on three projects under the program. Each bidder was required to post a bond of approximately $40,000. The low bidders on the three contracts were Underground Pipeline Company, Platt Construction, Inc., and Lakeside Paver, Inc./ Payne & Dolan, Inc.

If normal procedures were followed, after the bids were awarded a contract was sent to each bid winner and the $40,000 bonds were returned to all bidders except those to whom the contracts were awarded. The bid winners now have approximately 14 days after the award to execute the contract. Once the contracts are returned to the department, the department staff will review them. The department will then sign the contracts and send them to the governor for approval. The fourth contract under the challenged program is scheduled to be let April 21, 1989.

If the department were required to relet the bids, it would need to re-advertise the projects and re-notify potential bidders. The cost would be $500-$1500 per project. The department might be obliged to repackage the projects as a result of changed time requirements. If it were, the costs of reletting the bids would rise 200-400%.

If the department were not able to relet the bids before May, construction would not be completed this year and the costs of the projects could increase substantially.

Two plaintiffs in this case, Pac-Sac Construction and Paving Mix and Construction, were at one time certified as disadvantaged firms. They were decertified after the department determined that they were not actually managed and controlled by disadvantaged individuals. No other plaintiff has applied for certification as a disadvantaged business.

OPINION

Plaintiffs must establish five elements in order to succeed on a motion for a preliminary injunction: 1) that plaintiffs have no adequate remedy at law; 2) that they will suffer irreparable harm if the injunction is not issued; 3) that the harm to them if the injunction is not granted is greater than the harm to defendants if the injunction is granted; 4) that the injunction will not harm the public interest; and 5) that plaintiffs have a reasonable likelihood of prevailing on the merits. *Brunswick Corporation v. Jones*, 784 F.2d 271, 273-74 (7th Cir. 1986). A preliminary injunction is an extraordinary remedy and thus is unavailable unless plaintiffs meet the burden of persuasion as to all of the prerequisites. *Shaffer v. Globe Protection, Inc.*, 721 F.2d 1121, 1123 (7th Cir. 1983).

1. *Likelihood of Success on the Merits*

The most vexing question in this case is whether plaintiffs are likely to succeed on the merits of their claim. The issues of the wisdom and validity of affirmative action programs based on benign racial and gender classifications have engendered controversy and passion; the United States Supreme Court has not spoken unequivocally on these questions. In the various plurality and concurring opinions in the most important affirmative action cases, *Fullilove v. Klutznick*, 448 U.S. 448 (1980),

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), and *University of California Regents v. Bakke*, 438 U.S. 265 (1978), the Court did not reach a majority consensus about the proper standard of review applicable to benign racial classifications, the varying power of private and government entities to establish such classifications, the intentions and factual findings needed to support such classifications, or the permissible scope of affirmative action plans. Although the Court's decision in its most recent affirmative action case, *City of Richmond v. J.A. Croson*, 57 U.S.L.W. 4132 (January 24, 1989), answers only some of these questions, it provides the basis for an analysis of plaintiffs' claim. Despite the questions *Croson* leaves unresolved, it clearly modifies the analysis lower courts should apply when reviewing the constitutionality of affirmative action programs. As a result, cases decided before *Croson* are of limited usefulness.

It is not necessary at this stage of the litigation and in the absence of a fully developed factual record to determine definitively this court's understanding of the import and impact of the recently announced decision or whether the challenged Wisconsin affirmative action program is constitutional under the standards it articulates. On a motion for a preliminary injunction, plaintiffs need not show a "substantial" likelihood of success on the merits; the standard is that plaintiffs must show a better than "negligible" chance of success. *A.J. Canfield Co. v. Vess Beverages Inc.*, 796 F.2d 903, 906 (7th Cir. 1986). This order sets forth my preliminary understanding of *Croson* and of this case.

a. *City of Richmond v. Croson*

City of Richmond v. Croson concerned a city plan that required prime contractors receiving city contracts to subcontract at least 30% of the dollar amount of the contract to minority businesses. 57 U.S.L.W. at 4134. A minority business was one at least 51% owned and con-

trolled by minority group members. *Id.* The city defined minority group members as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.*, citing Ordinance No. 83-69-59. The plan was enacted at a city council meeting at which the council heard general testimony concerning discrimination against minorities in construction in the city and the nation. The plan contained no geographic limitation. It permitted waivers of the 30% requirement only in exceptional circumstances. It contained no provisions for direct administrative review of a denial of a waiver or of the determination that a firm was or was not minority owned. *Id.* at 4135. A non-minority owned prime-contractor challenged the plan as a violation of its right to equal protection under § 1 of the Fourteenth Amendment.

Justice O'Connor's opinion for the Court gained a majority of the justices in only the recitation of the facts of the case and in two of its five analytical sections. After Justice O'Connor presented the underlying facts of the case for a majority of the court, writing for herself and only two other justices, she set the decision in the context of the Court's earlier decisions in *Wygant* and *Fullilove*. *Croson*, 57 U.S.L.W. at 4137-38. In *Wygant*, the Court struck down an affirmative action program established by a city school board. 478 U.S. 267. In *Fullilove*, the Court upheld a congressional spending program setting aside 10% of funds authorized for public works projects for businesses owned by minority individuals. 448 U.S. at 453. Justice O'Connor emphasized that these differing outcomes were mandated largely by the differing powers of Congress and states and local governments under the Fourteenth Amendment. Based on a historical distrust of the states in the matter of race, in section 1 of the Amendment the framers of the reconstruction amendments prohibited the states from depriving any person of equal protection of law. Going further, in section 5 of the Amendment, they granted Congress broad power to

enforce the equal protection command. 57 U.S.L.W. at 4138; *see Fullilove*, 448 U.S. at 483-84; *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Thus, Congress may enact race-based remedial legislation that might be impermissible if enacted by a state.

Part IIIA of O'Connor's opinion, joined by three justices, suggested that all racial classifications, including those adopted for remedial purposes, should be subject to strict scrutiny. 57 U.S.L.W. 4138-40. She noted that even if a lower level of scrutiny were appropriate where minorities are aided by remedial legislation, that would not be the case in Richmond, where Blacks are a majority, comprising approximately 50% of the city population and holding five of the nine seats on the city council. *Id.* at 4139.

Part IIIB, which gained the support of a majority of the Court, undertakes a searching review of the factual findings underlying the City of Richmond's determination that its plan was necessary to remedy past effects of discrimination against minorities in construction. *Id.* at 4140-42. While not necessarily applying the standard of strict scrutiny suggested by the plurality in Part IIIA, the Court engaged in a more rigorous inquiry into the factual predicate for remedial legislation than it had in prior cases. The Court seemed to looked for specific, documented evidence that particular minorities or minority firms were discriminated against in the construction industry in Richmond. To hold that the plan was constitutional, the district court had relied upon five findings: "(1) the ordinance declares itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received .67% of prime contracts from the city while minorities constituted 50% of the city's population; (4) there were very few minority contractors in local and state contractors' associations; and (5) in 1977, Congress made a determination that the

effects of past discrimination had stifled minority participaiton in the construction industry generally." *Id.* at 4140. The majority found that none of these was sufficient to establish that remedial legislation was necessary. *Id.*

In Part IV, a majority of the Court concluded that the city was required to show that its plan was "narrowly tailored to remedy prior discrimination" and found that it had not made that showing. *Id.* at 4142. The city had not shown that it had considered race-neutral methods of increasing minority participation, that the 30% quota was tailored to a specific goal, or that the plan aided those firms that had suffered from past discrimination in Richmond. In Part V, Justice O'Connor, joined only by Justice Kennedy, suggested what types of state remedial action might be found to be constitutional and emphasized that race-neutral efforts were preferable. *Id.* at 4143.

In this case, plaintiffs contend that the state's disadvantaged business demonstration and training program, Wis. Stat. § 84.076, is unconstitutional under the standards articulated in *Croson* because it excludes plaintiffs from bidding on $4 million of state construction contracts on the basis of their race, gender, or national origin without reliance on any detailed factual findings of prior discrimination in the construction industry in Wisconsin. The state attempts to take the case out of the province of *Croson* and the entire affirmative action quagmire by contending that the program makes classifications based on the non-invidious categories of "social and economic disadvantage" and not based on the suspect classifications of race, gender, or national origin. Although the state's contention is ingenious and appealing, it must ultimately fail. Its failure does not suggest that state programs that reserve special privileges for the socially and economically disadvantaged are constitutionally suspect. "Classification is the essence of all legislation, and only those classifications which are invidious, arbitrary, or irrational of-

fend the Equal Protection Clause of the Constitution." *Clements v. Fashing*, 457 U.S. 957, 967 (1981), citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). The state's argument fails because neither the language of the relevant state and federal statutes and regulations nor the state's description of the operation of the program suggests that the classifications of the challenged program are indeed based on the non-invidious and non-suspect classificaiton of disadvantage, *cf. San Antonio School District v. Rodriguez*, 411 U.S. 1, 18-44 (1972) (disadvantaged poor are not a suspect class), and not race, gender, or national origin.

b. *Basis of State Classification*

It appears that under the program the state sets aside $4 million a year of construction contracts for bidding by firms certified to be "disadvantaged."[5] In order to bid

[5] Inconsistencies exist between the language of the challenged state statute and the state's description of its operation. The statute is entitled "*Disadvantaged* business demonstration and training program." Wis. Stat § 84.076. Its definitional sections define the terms "disadvantaged individual," "disadvantaged business," "minority business," and "minority group member." Wis. Stat. § 84.076 (a)-(d). The statute stated purpose is to develop the capabilities of "disadvantaged" businesses and to this end, it requires the Secretary of the Department of Transportation to allocate $4 million a year to the program and to compile a list of eligible "disadvantaged" businesses. Wis. Stat § 84.076(2)(a), (3). The statute further provides that "[t]he secretary shall attempt to ensure that 75% of the amount so allocated each fiscal year is for the awarding of contracts under this section to minority businesses. The secretary may award 100% of the amount so allocated each fiscal year to one disadvantaged business." Wis. Stat. § 84.076(2)(a). Minority group members are defined as Blacks, Hispanics, American Indians, Eskimos, Aleuts, Native Hawaiians, Asian-Indians, and Asian-Pacifics. Wis. Stat. §§ 84.076(d); 560.036(1)(f).

The facts that the statute contains definitions of both "disadvantaged individual" and "minority group member" and provides that 75% of the contracts should be let to "minority businesses" suggests that most of the contracts are let on the basis of the race

for the $4 million of contracts reserved for disadvantaged businesses under Wis. Stat. § 84.076, a firm must establish that it qualifies as a socially and economically disadvantaged business. A disadvantaged business is a small business that is at least 51% owned and operated by disadvantaged individuals. Wis. Stat. § 84.076(1)(b). A disadvantaged individual is "a minority group member, a woman, or any other individual found to be socially

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and national origin of the bidders. However, witnesses for the state have testified, and the plaintiffs have *not* contested, that the state has not implemented the provisions relating to minority group members or minority firms and opens all bidding under the program to all businesses certified to be disadvantaged.

The inconsistencies are likely due to the transformations the statute underwent on the journey from bill to law. What became Wis. Stat. § 84.076 was originally introduced on March 11, 1988 as part of the Assembly Substitute Amendment 1 to the 1987 Assembly Bill (AB) as a "Minority Business Development and Training Program." In the state's own words, the bill was "a rigid, race-based set aside program for minorities only." Aff. of James S. Thiel, General Counsel of the State of Wisconsin Department of Transportation. Aware that *Croson* was pending before the Supreme Court and that the Court might find the similar Richmond minority set-aside program to be unconstitutional, the Department of Transportation requested that the legislation be amended to be a "disadvantaged business" program designed to aid "*all* disadvantaged businesses." *See* Drafting Request Form for DOT, March 15, 1988; Letter from Secretary of Transportation Ronald Fiedler to State Senator Gary George, April 18, 1988. When the bill was amended to reflect the department's request, all references to minorities were not deleted. *See* Senate Amendment 9 to 1987 Assembly Bill 850 (March 23, 1988); Conference Amendment 5 to Conference Amendment 1 to 1987 Assembly Bill 850 (April 20, 1988); 1987 Wis. Act 399 § 3037(3M).

If the statute is read as it is written, it clearly contains classifications based on gender, race, and national origin. The constitutionality of such classifications will be discussed below. However, in light of the legislative history of the law and the evidence that the state does not operate the program in the manner a plain reading of the statute suggests, for the purpose of evaluating the state's argument that the program discriminates on the basis of economic and social disadvantage and not race, gender or national origin, I will have examined the program as it is actually operated.

and economically disadvantaged by the department as provided in 49 CFR 23.62, unless successfully challenged as provided in 49 CFR 23.69." A minority group member is a Black, Hispanic, American Indian, Eskimo, Aleut, Native Hawaiian, Asian-American, or Asian-Pacific. Wis. Stat. §§ 84.076(3)(c); 560.036(1)(e)1. The exact parameters of these racial and ethnic categories are defined at 49 C.F.R. § 23.62 (*see, e.g.*, § 23.62(b) defining "Hispanic Americans" as "persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.") 49 C.F.R. § 23.62 also provides that any other minority group or any individual found to be disadvantaged under section 8(a) of the Small Business Act is defined as disadvantaged under the regulation. It appears that no group defined as disadvantaged under 49 C.F.R. § 23.62 or § 8(a) of the Small Business Act is excluded from the listing of minority groups found in the Wisconsin statute. In fact, the state listing of minority groups may be broader than the federal definition. 49 C.F.R. § 23.62 explicitly excludes persons from Burma, Thailand, and Portugal from its definition of minority. *See* 49 C.F.R. § 23, Appendix A (analysis of § 23.62). The state does not appear to have made that same exclusion.

The regulations provide a fairly detailed explanation of the elements of social and economic disadvantage. 49 C.F.R. § 23, Appendix C, §§ (A)-(B). According to the regulations, social disadvantage "must stem from [an individual's] color; national origin; gender; physical handicap; long-term residence in an environment isolated from the mainstream of American society; or other similar cause beyond the individual's control." *Id.* Furthermore, the individual must show a personal experience of social disadvantage that is long-standing and has negatively influenced his or her advancement in business. *Id.* Social disadvantage can be proved by a variety of evidence attesting to the applicant's personal experiences of disadvantage, including denial of access to education,

social pressures limiting the applicant's business success, employment discrimination, or exclusion from professional organizations. *Id.*

Economic disadvantage is a secondary determination that may be made only after social disadvantage has been determined. *Id.* The regulations state that "[a]s a general rule, economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same or similar line of business and competitive market area who are not socially disadvantaged."

Under both the express language of 49 C.F.R. § 23.62 and its appendices and the state's implementation of Wis. Stat. § 84.076, a minority group member is presumed to be socially and economically disadvantaged. Neither 49 C.F.R. § 23.62 or the regulations promulgated under § 8(a) of the Small Business Act, 13 C.F.R. § 124.105-06, presumes that women are disadvantaged. However, the language of the Wisconsin statute suggests that women should be presumed disadvantaged and the testimony of the director of the disadvantaged business program suggested that the state does presume disadvantage on the basis of gender. A third party, or the state on its own initiative, may challenge the presumption that a woman or minority is disadvantaged by presenting evidence that the individual is not socially or economically disadvantaged. 49 C.F.R. § 23.69.

The presumption that a woman or a member of a minority group is economically disadvantaged can be and has been challenged successfully. In at least a few cases, the state has found that individuals who are socially disadvantaged are not economically disadvantaged. For example, two wealthy Black male athletes were found to be not economically disadvantaged due to their excellent finances and access to credit. However, it does

appear that the presumption of social disadvantage is rebuttable.

The regulations provide a telling example of when the presumption of social disadvantage could be rebutted.

> If an individual has not maintained identification with the group to the extent that he or she is commonly recognized as a group member, it is unlikely that he or she will in fact have suffered the social disadvantage which members of the group are presumed to have experiences. [sic] If an individual has not held himself or herself out to be a member of one of the groups, has not acted as a member of a community of disadvantaged persons, and would not be identified by persons in the population at large as belonging to the disadvantaged group, the individual should be required to demonstrate social disadvantage on an individual basis.
>
> For example an individual could demonstrate that he had a Chinese ancestor. However, this hypothetical person has never lived in a Chinese-American community, has held himself out to be white for driver's license or other official records purposes, has not previously claimed to be a Chinese-American, and would not be perceived by others in either the Chinese-American community or non-minority community to be Chinese-American (or any other sort of Asian-Pacific American) by virtue of his appearance, culture, language or associations. The recipient should not regard this individual as an Asian-Pacific American.

49 C.F.R. § 23, Appendix C. The state apparently has applied this understanding of the rebuttable presumption of social disadvantage in its program. In response to a question about when the department would find that a member of a listed minority group was not socially disadvantaged, the director of the state program

replied with the example of a Black man who did not appear to be Black, did not hold himself out as Black, and did not identify with the Black community.

A "rebuttable presumption" of this sort is hardly worthy of the term. To "rebut" the "rebuttable presumption" that a member of a minority group is socially disadvantaged the challenger is not asked to show that the individual minority member was not a victim of social disadvantage. If this were the showing, the presumption would be truly rebuttable. A challenger might well be able to prove that a particularly fortunate minority group member suffered no instances of discrimination and no obstacles attributable to ethnicity or race or gender. However, the challenger is required to make a far greater showing. To rebut the presumption of social disadvantage it must be demonstrated that for all practical purposes the applicant is not a member of the minority group to which he or she claims to belong. A minority group member who does not appear to belong to the group, does not identify with it, is not identified by others as a member of the group, and perhaps holds himself out to be a member of another group can hardly be said to be a member of that group. Thus, for all practical purposes, all members of minority groups are irrebuttably presumed socially disadvantaged for purposes of the statute.[6]

Furthermore, it is not at all clear how a woman could rebut a presumption of social disadvantage. The pertinent federal regulations do not address the question be-

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[6] Defendants place great weight on the fact that United States Supreme Court and the Court of Appeals for the Fourth Circuit have held that in some contexts only irrebuttable presumptions concerning race are constitutionally infirm. *See Vlandis v. Kline*, 412 U.S. 411, 453 (1973); *Deel v. Jackson*, 862 F.2d 1079, 1088 (4th Cir. 1988). I state no opinion whether the state plan would be constitutional if the state were able to show that the presumption of social disadvantage were actually rebuttable.

cause under those regulations gender is not a relevant classification. The example of rebuttal the state provided for members of minority groups has little applicability to gender issues.

Because the presumption that members of specified minority groups are socially disadvantaged is essentially irrebuttable, I am unable to find that the classifications of Wis. Stat. § 84.076 are based on disadvantage and not race, gender, and national origin. Where race, national origin and gender are proxies for socially disadvantaged, the use of the term socially disadvantaged does not enable the court to ignore that the underlying classification is clearly based on invidious categories.

Some individuals who are not women or members of the identified minority groups may be found to be both socially and economically disadvantaged. Disabled Vietnam veterans, Appalachian white males, Hasidic jews, and others may be able to demonstrate that they are both socially and economically disadvantaged. *See*, 49 C.F.R. § 23, Appendix A (analysis of § 23.62). Wisconsin has found a white male disabled veteran of the Vietnam war to be socially and economically disadvantaged. However, that some non-minorities are found to be disadvantaged, does not alter the fact that *all* minority members and women are found to be socially disadvantaged (unless, of course, it is shown that the minority member or woman is in no way identified with that minority group) and that the statutory classifications are essentially based on race, gender and national origin.

In their artful brief, amici contend that this court is obliged to construe the Wisconsin statute as constitutional if such a construction of the statute is possible. They suggest that the statutory language of Wis. Stat. § 84.076(1)(a), "found to be socially and economically disadvantaged" should be read to modify "not only 'any other individual' but also 'minority group member' and 'woman.' Thus, only socially and economically disadvan-

taged minorities and women—indeed, only socially and economically disadvantaged *people*—are included in the Program." Although the argument is appealing, it ignores the underlying flaw of the statute as it is written and as the state applies it. The statute defines the term "social disadvantage" in terms of race, gender and national origin. If one is a member of a specific group, one is irrebutably socially disadvantaged.

The legislative history of the challenged statute buttresses my impression that the operative categories of Wis. Stat. § 84.076 are not "disadvantage-advantage" and that the presumption that minorities and women are socially disadvantaged is not intended to be rebuttable in any practical sense. The provisions that were eventually enacted as § 84.076 were originally introduced as a "*Minority* Business Development and Training Program." In order to avoid possible constitutional infirmities with a racial classification, the Department of Transportation suggested that *disadvantaged* be substituted for *minority* and that the administrative rules set out in 49 C.F.R. § 23 apply to determinations of eligibility. Most of the suggested changes were made, but the legislation was not changed in any way that suggests that the program was fundamentally altered.

Furthermore, as I have found, after the legislation was enacted, the Department of Transportation hired two firms to manage the projects and develop training requirements. In written materials sent to prospective bidders these firms used the term "minority" businesses and not "disadvantaged" businesses. This suggests that those working with the program believe that the operative criteria for eligibility were race, national origin, and gender, and not disadvantage. That the department wrote to all potential bidders advising them that in their bid proposals they must change the term "minority" to "disadvantaged" or risk rejection of the bid does not alter this conclusion. That the department realized that

it needed to present the program as a *disadvantaged* business program does not lead to the conclusion that in fact the program determined eligibility on the basis of disadvantage and not race, national origin, or gender.

c. *Constitutionality of Classifications based on Race, National Origin And Gender*

Having determined that under Wis. Stat. § 84.076 women and identified minorities are irrebuttably presumed to be socially disadvantaged and thus that the operative classifications of the statute are based on race, gender, and national origin, I must decide whether such classifications by state legislatures are permissible in the wake of *City of Richmond v. J.A. Croson.*[7]

Whatever the ambiguities of the opinion and the various concurrences, it is clear that a majority of the Court

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[7] Although the *Croson* decision speaks in terms of race, it is clearly aimed at classifications based on national origin as well. The Richmond plan included Spanish-speaking, Oriental, Indian, Eskimo, and Aleut persons as well as Blacks. The Court's analysis did not differ where the classifications were arguably based on national origin and not race. *See* 57 U.S.L.W. at 4142.

Furthermore, *Croson* did not address the issue of classifications based on gender. Because gender classifications are not the focus of the reconstruction amendments and such classifications in non-remedial legislation are not subject to strict scrutiny, *see e.g., Craig v. Boren,* 429 U.S. 190 (1976), it may be that gender classifications are subject to the analysis articulated in *Croson.* At this point in the litigation, it is not necessary to determine the validity of gender classifications separately. It may be that at some point the state will argue that even if the portions of Wis. Stat. § 84.076 based on race and national origin are found to be unconstitutional, the statute's gender classifications should be upheld. Until that time, I will concentrate on the constitutionality of the race and national origin classifications. For the purpose of deciding this motion for a preliminary injunction, the fact that one small portion of the statute which defendants have not in any way emphasized as important may be constitutional, does not provide a basis for finding that plaintiffs do not have a likelihood of success on the merits of their claim that Wis. Stat. § 84.076(1)-(2) violates the equal protection clause of the Fourteenth Amendment.

believes that state laws employing racial and ethnic classifications must be supported by specific evidence of discrimination in the state against those aided by the statute and be narrowly tailored to remedy those past wrongs. 57 U.S.L.W. 4140-43; *see also id.* at 4152, 4156 (Marshall, J. dissenting). The evidence of past discrimination may not be cursory or generalized. In *Croson*, the majority rejected the evidence Richmond put forward to support its program. Richmond titled its plan "Remedial"; at the Richmond City Council meeting at which the plan was adopted, proponents of the program stated that racial discrimination existed in the construction business "in this area, and the State, and around the nation"; only .67% of prime contracts were awarded to minority businesses although Blacks constituted more than 50% of the city's population; few minority businesses belonged to local contractors' associations; and Congress, in connection with unrelated federal statutes had found evidence of nationwide discrimination in the construction industry. *Id.* at 4140.

The Court gave little weight to the city's "recitation of a remedial purpose." *Id.* at 4140. The Court characterized the testimony at the city council meeting to be merely "generalized assertion[s]." *Id.* at 4141. It found the statistical evidence unconvincing because "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task" or eligible for membership in a particular organization, and not the number of minorities in the general population. *Id.* Finally, the Court held that congressional findings of nationwide discrimination were not satisfactory evidence of past discrimination in the City of Richmond. *Id* at 4141-4142.

Furthermore, the Court stressed that while the evidence concerning discrimination against Blacks was unsatisfactory, the evidence including other minorities in-

cluded in the program was non-existent. "There is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aluet persons in any aspect of the Richmond construction industry." *Id.* (emphasis in original).

The State of Wisconsin has not offered the evidence of past discrimination against the identified minorities in the Wisconsin construction industry that is necessary to support the state adoption of racial classifications. The director of the disadvantaged business demonstration and training program has averred that the program was adopted in response to complaints from non-disadvantaged prime contractors that the disadvantaged business subcontractors were not performing satisfactorily and complaints from disadvantaged businesses that they were not able to qualify for prime contracts due to economic barriers. This evidence is too generalized and conclusory to meet the requirements of *Croson*. It is unknown how many complaints were made, the extent of the problems complained of, the race, national origin or gender of those complaining, or whether specific evidence of discrimination was presented.

However, it may be that the state will be able to put forward evidence of past discrimination against the identified minorities in the Wisconsin construction industry. Perhaps the complaints were so extensive and detailed that they provide adequate documentation of discrimination. Or perhaps the state considered other evidence of discrimination before adopting Wis. Stat. § 84.076.[8]

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[8] Because the state has depended upon its argument that Wis. Stat. § 84.076 does not establish classifications based on race, gender, and national origin, it perhaps has not considered what evidence would be necessary to support such classifications. Thus, although the state has not yet put forward any evidence that it had specific evidence of discrimination in the Wisconsin construction industry and that it enacted the program based on that evidence, it may be able to do so.

Furthermore, it is not clear that the state must establish that it had the necessary evidence of past discrimination prior to the enactment of Wis. Stat. § 84.076 and that it enacted the legislation as a direct response. Although *Croson* seems to impose what Justice Marshall describes in his dissent as "onerous documentary obligations," the decision does not specify explicitly when the documentation must be made. It may be that the state can show that prior to the enactment of the program the state was in possession of evidence of discrimination against these groups in the state construction industry. That the state may not have explicitly based the remedial legislation on that evidence does not necessarily preclude the state from relying on it now. Alternatively, it may be that the state should be able to submit to this court any evidence it might now have or be able to develop of past discrimination against the identified minorities in the Wisconsin construction industry. Prior to the Supreme Court's decision in *Croson*, states were not obliged to develop a detailed evidentiary record to support a racial classification and therefore had no reason to do so. Thus, it might be proper now that the state is aware of the requirement, to allow it to fulfill it after the enactment of the classification. However, at this stage of the litigation I am not prepared to assume that the state will be able to make the necessary showing, or indeed that it should be permitted to attempt to do so.

The only other evidence in the record even suggesting that such discriminaion may exist or may have existed in Wisconsin is the legislative history underlying the federal Surface Transportation Act of 1982 and the regulations it either implements or adopts. *See* 49 C.F.R. § 23; 13 C.F.R. § 124. The Act included a 10% set-aside for disadvantaged businesses. Pub. L. No. 97-424 § 105(f). It appears that all states wishing federal aid for highway construction were required to develop state programs to implement the set-aside requirement. Wisconsin had de-

veloped such a program. It was because of the problems the state encountered in this program that it enacted the challenged statute.

When Congress enacted the Surface Transportation Act of 1982 it had before it a history of extensive fact-finding concerning nationwide discrimination against minorities in the construction industry. The origin of the set-aside provision in the Act is identical to that in the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116. *Carpenter v. Dole*, slip. op. 85-527-CIV-5 at 22 (E.D.N.C. March 6, 1987). Furthermore, both were linked to § 8(a) of the Small Business Act. *Fullilove v. Klutznick*, 448 U.S. at 463; 49 C.F.R. § 23.62. The Supreme Court addressed the constitutionality of the set-aside provision of the Public Works Employment Act of 1977 in *Fullilove* and in a plurality opinion found that it was constitutional. Its constitutionality was premised, in part, upon the extensive fact-finding Congress had made concerning nationwide discrimination in construction. *See* 448 U.S. at 459-67; *see also id.* at 504-06 (Powell, J., concurring). Although the state has not commented extensively on the existence of these congressional findings, it may be that defendants will be able to rely upon them.

In *Croson*, the district court judge relied on the congressional findings reviewed in *Fullilove* that nationwide discrimination in construction eixsted. A majority of the Supreme Court found that "[t]he probative value of these findings for demonstrating the existence of discrimination in Richmond is extremely limited." 57 U.S.L.W. at 4141-42. The Court declined to rely upon the congressional findings because the waiver procedure in the Public Works Employment Act program showed that "Congress explicitly recognized that the scope of the problem would vary" across the nation. *Id.* at 4142. Thus, Richmond could not properly rely on findings of nationwide discrimination to support a finding of local discrimination.

An unpublished decision by the District Court of the Eastern District of North Carolina submitted by defendants, suggests a basis for distinguishing the present case from *Croson* so as to allow the state, and thus this court, to rely upon Congress's nationwide findings. *Carpenter v. Dole*, slip op. 85-527-CIV-5 (E.D.N.C. March 6, 1987). In *Carpenter* several non-disadvantaged construction companies contested, among other things, North Carolina's decision to establish a disadvantaged business program so as to be able to receive federal funds under the Surface Transportation Act of 1982. The North Carolina program was based on the requirements of the Surface Transportation Act and 49 C.F.R. § 23. In response to the plaintiffs' contention that the state plan was constitutionally infirm because there had been no findings of prior discrimination in North Carolina, the district court pointed out that the state plan was not a state program, "but rather is the final step in the implementation of a congressional created federal remedial action." *Carpenter*, slip. op. at 22. The court found no authority for the position "that a state agency must enter independent specific findings of past state governmental discrimination in order for its voluntary participation in a congressionally enacted remedial program to pass constitutional muster." *Id.* at 23.

Croson is not necessarily authority to the contrary. The Richmond plan was not enacted pursuant to any federal legislation. Thus, the Court's decision to discount the "probative value" of the congressional findings in that case does not indicate that where a state program is enacted to implement a federal program the state cannot legitimately rely upon congressional findings of nationwide discrimination.

Of course, the statute challenged in this case is not the Wisconsin statute implementing § 105(f) of the Surface Transportation Act. However, the challenged statute

could be considered a mere elaboration on the implementing legislation. After Wisconsin implemented the 10% set-aside provisions of the Surface Transportation Act in order to be eligible for federal highway aid, the state experienced problems with the program. Specifically, non-disadvantaged prime contractors complained that the disadvantaged businesses that they had hired as subcontractors in order to meet the 10% quota were not performing adequately. Disadvantaged businesses complained that they were unable to become prime contractors as a result of economic obstacles created by their minority status.

In order to address these problems, and perhaps also to improve implementation of federal requirements so as to ensure that Wisconsin would be able to meet them and not risk forfeiting federal highway aid, the state enacted the challenged disadvantaged business demonstration and training program. The legislation sets aside less than 2% of the dollar amount of state construction contracts ($4 million of more than $300 million) to be let solely to disadvantaged businesses. The criteria of eligibility are virtually identical to those of the pre-existing state implementation program as are the procedures used to determine and contest eligibility. In sections of the statute not challenged in this action, specific training programs were established.[9] These provisions appear to be closely

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[9] Wis. Stat. § 84.076(4) provides:

> Each contractor shall agree to do one of the following in its bids submitted under sub. (3):
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> (a) 1. Assure that the contractor has developed a program of preapprenticeship training that satisfies the requirements established by the secretary under sub. (2)(b) and has experience in providing the training to disadvantaged individuals; and
>
> 2. Assure that the contractor has developed and has experience in providing a program of management and technical assistance to disadvantaged business subcontractors. The management and technical assistance program shall satisfy the requirements

tailored to the goal of improving the ability of disadvantaged businesses to participate in construction projects let under the requirements of the federal program.

In light of the relation of Wis. Stat. § 84.076 to the state program implementing the Surface Transportation Act of 1982 and to the federal Act itself, it may be possible to regard § 84.076 as a mere elaboration on the federal scheme designed only to implement better the requirements of the federal law. However, none of the parties have suggested this interpretation and virtually no evidence concerning the relationship of the state and federal programs, the percentage of federal funds used in state highway construction, or the relation between the challenged statute and the pre-existing state program is currently before the court. As a result, I decline to find at this time that because the challenged statute is in some fashion implementing a specific federal law the state would be able to rely on congressional findings of nationwide discrimination.

To reiterate, my preliminary understanding of the plaintiffs' likelihood of success on the merits of their claim is as follows. I am unpersuaded that Wis. Stat. § 84.076 determines eligibility for the disadvantaged business program on the basis of disadvantage and not race, national origin, or gender. If the state could show that the presumption that minorities and women are socially disadvantaged is indeed rebuttable, the statute might survive scrutiny. Furthermore, I find that the state has not

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established by the secretary under sub. (2) (b) and shall include all of the following:

a. On-site administrative support.

b. Assistance with managing schedule, finances and property.

c. The provision of other management services necessary to assist disadvantaged businesses in developing construction capabilities and opoprtunities for participation in construction projects.

yet shown or indicated that it will be able to show that the classifications of the statute were based on specific evidence of discrimination in the state. I have not yet determined whether the state is required to have made evidentiary findings prior to enactment of the statute or whether it may make those findings now and present them to the court. Finally, because no argument or evidence has been presented on the question, I have not determined whether the state may rely on congressional findings of nationwide discrimination to support the constitutionality of its program. Reviewing the foregoing analysis, I conclude that plaintiff's likelihood of success on the merits of their constitutional claim is better than negligible. Accordingly, I will consider the other factors that determine whether plaintiffs' request for a preliminary injunction should be granted.

2. *Irreparable Harm*

In order to prevail on the motion for a preliminary injunction, plaintiffs must also show that they will suffer irreparable harm if the injunction does not issue. Irreparable harm is "harm that cannot be prevented or fully rectified by the final judgment after trial." *Roland Machinery Co. v. Dresser Industries*, 749 F.2d 380, 386 (7th Cir. 1984). Plaintiffs allege irreparable harm on two grounds. First, they contend that the alleged violation of constitutional rights constitutes irreparable injury as a matter of law. Second, they contend that if the state executes the contracts that have already been let under Wis. Stat. § 84.076 and it is later found that the statute is unconstitutional and the plaintiffs were entitled to bid on those projects, it will be difficult if not impossible for plaintiffs to establish the amount of damages to which they would be entitled.

Plaintiffs' claim is that their right to equal protection of laws guaranteed by the Fourteenth Amendment is violated when they are excluded from bidding on spec-

ified state construction contracts because of their race, national origin, or gender. Where violations of constitutional rights are alleged, further showing of irreparable injury may not be required if more than merely money is at stake. *See Jessen v. Village of Lyndon Station*, 519 F. Supp. 1183, 1198 (W.D. Wis. 1981) (and cases cited therein); *Walters v. Thompson*, 615 F. Supp. 330 (N.D. Ill. 1985); Wright & Miller, Civil § 2948 at 440.

Another district court asked to enjoin enforcement of the minority business set-aside goals in an earlier version of 49 C.F.R. § 23 because the regulations were alleged to violate the Fourteenth Amendment held that "equal protection rights are 'so fundamental to our society that any violation thereof will cause irreparable harm irrespective of the financial impact.'" *M. C. West, Inc. v. Lewis*, 522 F. Supp. 383 (M.D. Tenn. 1981) (injunction not issued because under earlier law court found no likelihood of success on the merits), quoting *Central Alabama Paving, Inc. v. James*, 499 F. Supp. 629, 639 (M.D. Ala. 1980). I agree. The importance of the alleged infringement is not diminished by the fact that plaintiffs are members of groups that have not traditionally invoked the protections of the Fourteenth Amendment. In light of my finding that after *Croson* plaintiffs' likelihood of success on the merits of their constitutional claim is not negligible, I cannot consider their claim of constitutional right differently from the claim of any other litigant.[10]

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[10] Defendants rely extensively on *Jetts Services, Inc. v. Hoffman*, 420 F. Supp. 1300 (M.D. Fla. 1976), in which the district court denied the plaintiffs' motion to enjoin the enforcement of the Small Business Administration's disadvantaged business set-aside program (§ 8(a) of the Small Business Act) on the basis that plaintiff would not suffer irreparable harm if the injunction did not issue. *Jetts Services* is inapposite because the plaintiff did not claim a constitutional violation, but contended that an agency decision was an abuse of discretion. *Id.* at 1307.

Even if the violation of the right to equal protection of law is not an irreparable harm, the difficulty of calculating money damages suggests that plaintiffs could not be made whole by an award of money damages and thus that the injury to them would be irreparable if the injunction does not issue. In their complaint, plaintiffs have not requested monetary relief. This is appropriate because if they were to be successful on the merits of their claim prior to the execution of any contracts under Wis. Stat. § 84.076, they would suffer no monetary damages. Plaintiffs would be entitled to money damages only if their motion for a preliminary injunction were denied, they were to succeed ultimately on the merits of their claim, and the state construction projects were to have proceeded so far that they could not reasonably be re-let under non-discriminatory bidding conditions. Thus, the fact that money damages are not requested in the complaint does not diminish plaintiffs' argument that they may be entitled to money damages and that those damages will be difficult to calculate.

In *Roland Machinery, Co. v. Dresser Industries*, 749 F.2d at 386, the Court of Appeals for the Seventh Circuit noted that "[i]n saying that the plaintiff must show that an award of damages at the end of trial will be inadequate, we do not mean wholly ineffectual; we mean seriously deficient as a remedy for the harm suffered." The court outlined four instances in which a damage remedy could be inadequate. One was the situation in which the nature of the loss makes damages very difficult to calculate. The court discussed the difficulties encountered in trying to calculate damages for lost profits. *Id.*

Those difficulties are implicated here. To establish money damages, each plaintiff would try to show that if the bidding on the contracts let under Wis. Stat. § 84.076 had been open to all qualified firms, it would have made the low bid and received the contract. Each would then

attempt to show what their profit on the construction project would have been. Each firm would have to develop the equivalent of a bid proposal and compare it against those of all other potential bidders. Even then, the damages the party incurred would be entirely speculative. Because it would be so difficult to determine and award damages under these circumstances, it is unlikely that an award, if one could be made, would render any plaintiff whole.

3. *No Adequate Remedy at Law*

The requirement that a preliminary injunction may not issue unless plaintiffs have no adequate remedy at law is closely related to the requirement of irreparable harm. Many courts fuse them into a single requirement. *See Roland Machinery Co.*, 749 F.2d 383-83, 386 and cases cited therein. In this case, plaintiffs may have no adequate remedy at law for two reasons. First, as discussed above, any money damages that might be available if equitable relief is not forthcoming will not make plaintiffs whole. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (inadequate remedy at law where damages are such that measurement is difficult or impossible). Second, the Eleventh Amendment may bar any award of money damages. Some courts have suggested that when the Eleventh Amendment poses such a bar, plaintiff has no adequate remedy at law. *See, e.g., Jessen*, 519 F. Supp. at 1189; *Savage v. Co. of Pennsylvania*, 475 F. Supp. 524, 532-34 (E.D. Pa. 1979), *aff'd without opinion*, 620 F.2d 289 (3d Cir. 1980); *Scrank v. Bliss*, 412 F. Supp. 28, 28-40 (M.D. Fla. 1979). *But cf. Black United Fund of New Jersey, Inc. v. Kean*, 763 F.2d 156, 161 (3d Cir. 1985) (that Eleventh Amendment be an obstacle to recovery of damages in federal court does not transform money loss into irreparable injury). The conjunction of these deficiencies suggests that plaintiffs have no adequate remedy at law.

4. *Balance of Harms*

Having concluded that plaintiffs have a likelihood of success on the merits, that they will suffer irreparable harm if an injunction does not issue, and that they have no adequate remedy at law, I must weigh the harm to the plaintiff that would be incurred by a wrongful denial of a preliminary injunction against the harm incurred by defendants or third parties that could not be cured by prevailing on the merits. *A.J. Canfield Co.*, 796 F.2d at 908. Defendants have shown that if they must re-let the contracts let under Wis. Stat. § 84.076, they will incur an additional cost of $500-$6000 per contract. If the contracts cannot be let before May, the construction costs of these projects may rise substantially. Furthermore, there are the interests of the third-party low bidders who have incurred the cost of bidding for the contracts and now face the prospect of having to re-bid for what they have won, with the possibility they will lose the bid when the number of bidders is increased.

The harm the state and the low bidders will incur is monetary and could be cured by a security bond under Fed. R. Civ. P. 65(c). Furthermore, the state has not shown that the particular projects that it has selected to let under Wis. Stat. § 84.076 are particularly suited to letting under that statute, that they are particularly urgent, or that the state could not choose to let those specific projects under other statutory authorization. Thus, while the harm to the state and the low bidders is not minimal, it does not outweigh the harm plaintiffs will suffer if their constitutional right to equal protection is abridged.

5. *Public Interest*

When as in this case, a preliminary injunction has wide-ranging effects, the court must consider the public interest before granting or denying a motion for a pre-

liminary injunction. *Yakus v. United States*, 321 U.S. 414, 440-41 (1944); *A. J. Canfield*, 796 F.2d at 909; *Roland Machinery, Co.*, 749 F.2d at 388. The wisdom and legitimacy of affirmative action has been hotly debated in the spheres of politics, social science, and law. While politicians and social scientists are free to come to their own conclusions on the matter, lower federal courts are bound by the United States Supreme Court's decision that affirmative action is permissible only within narrowly defined limits. In *Croson*, the Court determined that affirmative action programs not meeting the requirements articulated in that decision cannot be constitutional. Legislation that is unconstitutional cannot be in the public interest. Because I have found that plaintiffs have a likelihood of succeeding on the merits of their claim that Wis. Stat. § 84.076 is unconstitutional, it follows that enjoining the implementation of statute is in the public interest.

6. *Bond*

Plaintiffs request that they be relieved of the obligation to post a security bond for the payment of costs and damages that might be incurred if defendants later prevail on the merits. Fed. R. Civ. P. 65(c) governs the imposition of an injunction bond:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper . . . .

Plaintiffs contend that they should be excused from the requirement because their constitutional rights are at stake and their claim raises issues of general public concern. Where constitutional rights are at stake, the bond requirement may be excused in some cases. *See* 7 Moore's Federal Practice ¶ 65.09 and cases cited therein. However, plaintiffs are far from indigent and have made no showing that the imposition of a bond will chill their attempt to vindicate their rights. Further-

more, in this case defendants will be likely to incur some monetary loss if the injunction is issued. Accordingly, I decline to waive the bond requirement.

Defendants may have until March 3, 1989 to submit briefs and evidentiary materials on the questions whether a bond should be required and what the amount of the bond should be. Plaintiffs may have until March 7, 1989 to submit briefs and evidentiary materials in response.

ORDER

IT IS ORDERED that plaintiffs' motion for a preliminary injunction is GRANTED.

Defendants are enjoined from executing the three contracts already let under Wis. Stat. § 84.076, from letting any other contracts under the statute, and from implementing the contested provisions of § 84.076 in any other manner.

Entered this 27th day of February, 1989.

BY THE COURT:

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Docket Number 89-C-177-C

JUDGE BARBARA B. CRABB

MILWAUKEE COUNTY PAVERS ASSOC., *et al.*

v.

RONALD R. FIEDLER, *et al.*

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by the Court. This action has come on for consideration by the Court with the judge (magistrate) named above presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiffs' and defendants' motions for summary judgment are GRANTED in part and DENIED in part and this case is DISMISSED with prejudice.

Defendants are enjoined permanently from implementing the following aspects of their disadvantaged business enterprise preferences:

(1) The setting of goals for disadvantaged business subcontractor participation on exclusively state funded projects;

(2) The provision in Wis. Stat. § 84.076(3)(b) setting goals for disadvantaged business subcontractor participation on projects let to disadvantaged prime contractors under the state's set-aside program;

(3) Any goals for disadvantaged business subcontractor participation on individual projects or any set-asides under Wis. Stat. § 84.076 past the date that the disadvantaged business enterprise program in the Surface Transportation Uniform Relocation and Assistance Act of 1987 is authorized.

Approved as to form this 7th day of March, 1990.

/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

/s/ Joseph W. Skupniewitz
JOSEPH W. SKUPNIEWITZ
Clerk

[Mar. 8, 1990]

APPENDIX G

FEDERAL REGULATIONS INVOLVED
TITLE 49 C.F.R. PART 23

PART 23—PARTICIPATION BY MINORITY BUSINESS ENTERPRISE IN DEPARTMENT OF TRANSPORTATION PROGRAMS

Subpart A—General

Sec.

23.1 Purpose.
23.3 Applicability.
23.5 Definitions.
23.7 Discrimination prohibited.

Subpart B—[Reserved]

Subpart C—Department of Transportation Financial Assistance Programs

23.41 General.
23.43 General requirements for recipients.
23.45 Required MBE program components.
23.47 Counting MBE participation toward meeting MBE goals.
23.49 Maintenance of records and reports.
23.51 Certification of the eligibility of minority business enterprises.
23.53 Eligibility standards.
23.55 Appeals of denials of certification as an MBE.

Subpart D—Implementation of Section 105(f) of the Surface Transportation Assistance Act of 1982

23.61 Purpose.
23.62 Definitions.

23.63 Applicability.
23.64 Submission of overall goals.
23.65 Content of justification.
23.66 Approval and disapproval of overall goals.
23.67 Special provision for transit vehicle manufacturers.
23.68 Compliance.
23.69 Challenge procedure.

APPENDIX A—SECTION-BY-SECTION ANALYSIS

APPENDIX B—DETERMINATIONS OF BUSINESS SIZE

APPENDIX C—GUIDANCE FOR MAKING DETERMINATIONS OF SOCIAL AND ECONOMIC DISADVANTAGE

APPENDIX D—JUSTIFICATION FOR REQUESTS FOR APPROVAL OF OVERALL GOALS OF LESS THAN TEN PERCENT

Subpart E—Compliance and Enforcement

23.73 Complaints.
23.75 Compliance reviews of recipients.
23.81 Conciliation procedures for financial assistance programs.
23.83 Enforcement proceedings for financial assistance programs.
23.85 Emergency enforcement procedure.
23.87 Suspension and debarment; referral to the Department of Justice.

SCHEDULE A—INFORMATION FOR DETERMINING MINORITY BUSINESS ENTERPRISE ELIGIBILITY

SCHEDULE B—INFORMATION FOR DETERMINING JOINT VENTURE ELIGIBILITY

AUTHORITY: Sec. 905 of the Regulatory Revitalization and Regulatory Reform Act of 1978 (45 U.S.C. 803); sec. 30 of the Airport and Airway Development Act of 1970, as amended; sec. 520 of the Airport and Airway Improvement Act of 1982, as amended by the Airport and Airway Safety and Capacity Expansion Act

of 1987; sec. 19 of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1615); sec. 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100-17); sec. 105(f) of the Airport and Airway Safety and Capacity Expansion Act of 1987 (Pub. L. 100-223); Title 23 of the U.S. Code (relating to highways and traffic safety, particularly sec. 324 thereof); Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*); Executive Order 12265; Executive Order 12138.

SOURCE: 45 FR 21184, Mar. 31, 1980, unless otherwise noted.

Subpart A—General

§ 23.1 Purpose.

(a) The purpose of this part is to carry out the Department of Transportation's policy of supporting the fullest possible participation of firms owned and controlled by minorities and women, (MBEs) in Department of Transportation programs. This includes assisting MBEs throughout the life of contracts in which they participate.

(b) This part implements in part section 905 of the Railroad Revitalization and Regulatory Reform Act of 1978 (45 U.S.C. 803); section 30 of the Airport and Airway Development Act of 1970, as amended (49 U.S.C. 1730); section 19 of the Urban Mass Transportation Act of 1964, as amended (Pub. L. 95-599); Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*); the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471 *et seq.*); and Title 23 of the U.S. Code (relating to highways and highway safety). This regulation supersedes all DOT regulations issued previously under these authorities, insofar as such regulations affect minority business enterprise matters in DOT financial assistance programs.

§ 23.2 Applicability.

This part applies to any DOT program through which funds are made available to members of the public for accomplishing DOT's purposes. Contracts and subcontracts which are to be performed entirely outside the United States, its possessions, Puerto Rico, and the North Mariana Islands, are exempted from this part.

§ 23.5 Definitions.

"*Affirmative action*" means taking specific steps to eliminate discrimination and its effects, to ensure nondiscriminatory results and practices in the future, and to involve minority business enterprises fully in contracts and programs funded by the Department.

"*Applicant*" means one who submits an application, request, or plan to be approved by a Departmental official or by a primary recipient as a condition to eligibility for DOT financial assistance; and "*application*" means such an application, request, or plan.

"*Compliance*" means the condition existing when a recipient or contractor has met and implemented the requirements of this part.

"*Contract*" means a mutually binding legal relationship or any modification thereof obligating the seller to furnish supplies or services, including construction, and the buyer to pay for them. For purposes of this part, a lease is a contract.

"*Contractor*" means one who participates, through a contract or subcontract, in any program covered by this part, and includes lessees.

"*Department*" or "*DOT*" means the Department of Transportation, including its operating elements.

"*DOT-assisted contract*" means any contract or modification of a contract between a recipient and a con-

tractor which is paid for in whole or in part with DOT financial assistance or any contract or modification of a contract between a recipient and a lessee.

"*DOT financial assistance*" means financial aid provided by the Department or the United States Railroad Association to a recipient, but does not include a direct contract. The financial aid may be provided directly in the form of actual money, or indirectly in the form of guarantees authorized by statute as financial assistance services of Federal personnel, title or other interest in real or personal property transferred for less than fair market value, or any other arrangement through which the recipient benefits financially, including licenses for the construction or operation of a Deep Water Port.

"*Departmental element*" means the following parts of DOT:

(a) The Office of the Secretary (OST);

(b) The Federal Aviation Administration (FAA);

(c) The United States Coast Guard (USCG);

(d) The Federal Highway Administration (FHWA);

(e) The Federal Railroad Administration (FRA);

(f) The National Highway Traffic Safety Administration (NHTSA);

(g) The Urban Mass Transportation Administration (UMTA);

(h) The St. Lawrence Seaway Development Corporation (SLSDC); and

(i) The Research and Special Programs Administration (RSPA).

"*Joint venture*" means an association of two or more businesses to carry out a single business enterprise for profit for which purpose they combine their property, capital, efforts, skills, and knowledge.

"*Lessee*" means a business or person that leases, or is negotiating to lease, property from a recipient or the Department on the recipient's or Department's facility for the purpose of operating a transportation-related activity or for the provision of goods or services to the facility or to the public on the facility.

"*Minority*" means a person who is a citizen or lawful permanent resident of the United States and who is:

(a) Black (a person having origins in any of the black racial groups of Africa);

(b) Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race);

(c) Portuguese (a person of Portuguese, Brazilian, or other Portuguese culture or origin, regardless of race);

(d) Asian American (a person having origins in any of the original peoples of the Far East. Southeast Asia, the Indian subcontinent, or the Pacific Islands); or

(e) American Indian and Alaskan Native (a person having origins in any of the original peoples of North America.)

(f) Members of other groups, or other individuals, found to be economically and socially disadvantaged by the Small Business Administration under section 8(a) of the Small Business Act, as amended (15 U.S.C. 637(a)).

"*Minority business enterprise*" or "*MBE*" means a small business concern, as defined pursuant to section 3 of the Small Business Act and implementing regulations, which is owned and controlled by one or more minorities or women. This definition applies only to financial assistance programs. For the purposes of this part, owned and controlled means a business:

(a) Which is at least 51 per centum owned by one or more minorities or women or, in the case of a publicly

owned business, at least 51 per centum of the stock of which is owned by one or more minorities or women; and

(b) Whose management and daily business operations are controlled by one or more such individuals.

"*MBE coordinator*" means the official designated by the head of the Department element to have overall responsibility for promotion of minority business enterprise in his/her Department element.

"*Noncompliance*" means the condition existing when a recipient or contractor has failed to implement the requirements of this part.

"*Primary recipient*" is a recipient who receives DOT financial assistance and passes some or all of this assistance on to another recipient.

"*Program*" means any undertaking by a recipient to use DOT financial assistance, and includes the entire activity any part of which receives DOT financial assistance.

"*Recipient*" means any entity, public or private, to whom DOT financial assistance is extended, directly or through another recipient for any program.

"*Secretary*" means the Secretary of transportation or any person whom he/she has designated to act for him/her.

"*Set-aside*" means a technique which limits consideration of bids or proposals to those submitted by MBEs.

[45 FR 21184, Mar. 31, 1980, as amended at 46 FR 60459, Dec. 10, 1981]

§ 23.7 Discrimination prohibited.

No person shall be excluded from participation in, denied the benefits of, or otherwise discriminated against in connection with the award and performance of any

contract covered by this part, on the grounds of race, color, national origin, or sex.

Subpart B—[Reserved]

Subpart C—Department of Transportation Financial Assistance Programs

§ 23.41 General.

(a) *Responsibilities of applicants and recipients.* (1) All applicants and recipients shall follow the requirements of § 23.43.

(2) Applicants and recipients in the following categories who will let DOT-assisted contracts shall implement an MBE program containing the elements set forth in § 23.45 (e) through (i). This program shall be submitted for approval to the DOT element concerned with the application for financial assistance or project approval.

(i) Applicants for funds in excess of $250,000, exclusive of transit vehicle purchases, under sections, 3, 5, 9, 9A, 17 and 18 of the Urban Mass Transportation Act of 1964, as amended, and Federal-aid urban systems.

(ii) Applicants for planning funds in excess of $100,000 under section 6, 8, 9 or 9A of the Urban Mass Transportation Act of 1964, as amended.

(iii) Applicants for Section 402 program funds of the National Highway Traffic Safety Administration;

(iv) Applicants for funds in excess of $250,000 awarded by the Federal Aviation Administration to general aviation airports;

(v) Applicants for funds in excess of $400,000 awarded by the Federal Aviation Administration to non-hub airports; and

(vi) Applicants for planning funds in excess of $75,000 awarded by the Federal Aviation Administration.

(vii) Licensees or applicants for a license under the Deepwater Port Act of 1974 (33 U.S.C. 1501 *et seq.*).

(3) All applicants and recipients in the following categories who will let DOT-assisted contracts shall implement an MBE program containing all the elements set forth in § 23.45. The program shall be submitted for approval to the DOT element concerned with the application for assistance or project approval.

(i) Applicants for Federal-aid highway program funds;

(ii) Applicants for funds in excess of $500,000, exclusive of transit vehicle purchases, under sections 3, 5, 9, 9A, 17 and 18 of the Urban Mass Transportation Act of 1964, as amended, and Federal-aid urban systems;

(iii) Applicants for planning funds in excess of $200,000 under section 6, 8, 9 and 9A of the Urban Mass Transportation Act of 1964, as amended.

(iv) Applicants for funds in excess of $500,000 awarded by the Federal Aviation Administration to large, medium and small hub airports; and

(v) Applicants for financial assistance programs, including loan guarantees, by the Federal Railroad Administration and the U.S. Railway Association.

(b) *Approval requirement.* Applications and funding agreements are signed and authorizations to proceed are approved only after the applicant's MBE program has been approved by the Departmental element. This requirement applies to applications, authorizations to proceed requested by Federal-aid highway program recipients, and requests for draw downs from the U.S. Railway Association submitted 90 days or more following the effective date of this part.

(c) *Effect of agreement.* The MBE program prepared by the applicant to carry out the MBE program is

incorporated into and becomes part of this agreement and subsequent financial assistance agreements. The agreement between the Department and the recipient shall contractually bind the recipient to the commitments made in the MBE program, as approved by the Department. Failure to keep these commitments shall be deemed noncompliance with this part. Once submitted and approved, an MBE program is applicable to all DOT-assisted contracts solicited and let by the applicant after the approval date of the MBE program regardless of the approval date of the grant or project under which the contracts are let.

(d) *Other MBE programs.* (1) Applicants meeting the criteria set forth in paragraph (a)(2) and (3) of this section who have formulated MBE programs under previous requirements of DOT or other agencies shall revise these programs to conform to the requirements of this part prior to the approval of their next application.

(2) An MBE program approved by one Departmental element is acceptable to all Departmental elements. Applicants having an approved MBE program are not required to resubmit the program or to produce a new program for future applications, as long as all requirements for approval continue to be met and implementation of the program is achieving compliance. The Departmental element reassesses its approval of the MBE program of continuing recipients at least annually.

(e) *Transit vehicle manufacturers.* Transit vehicle manufacturers who wish to bid on UMTA-assisted transit vehicle procurement contracts shall have a UMTA-approved MBE program. Each UMTA recipient shall require these manufacturers to certify that they have such a program as a condition for bidding on UMTA-assisted contracts.

(f) *Exemptions.* The head of the Departmental element may, under appropriate circumstances, and with the concurrence of the Secretary, grant deviations or exemptions from this subpart. A request for deviation or exemption from this subpart shall be in writing and shall include a showing as to how the particular situation is exceptional and how the modified program complies substantially with this part. If the applicant asserts that State or local law prohibits it from including a particular provision in its program, the applicant shall provide copies of all legal citations supporting the claim.

[45 FR 21184, Mar. 31, 1980, as amended at 48 FR 33444, July 21, 1983]

§ 23.43 General requirements for recipients.

(a) Each recipient shall agree to abide by the statements in paragraphs (a)(1) and (2) of this section. These statements shall be included in the recipient's DOT financial assistance agreement and in all subsequent agreements between the recipient and any subrecipient and in all subsequent DOT-assisted contracts between recipients or subrecipients and any contractor.

(1) "*Policy.* It is the policy of the Department of Transportation that minority business enterprises as defined in 49 CFR Part 23 shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under this agreement. Consequently the MBE requirements of 49 CFR Part 23 apply to this agreement."

(2) "*MBE Obligation.* (i) The recipient or its contractor agrees to ensure that minority business enterprises as defined in 40 CFR Part 23 have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with Federal funds provided under this agreement. In this regard all recipients or contractors shall take all

necessary and reasonable steps in accordance with 49 CFR Part 23 to ensure that minority business enterprises have the maximum opportunity to compete for and perform contracts. Recipients and their contractors shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of DOT-assisted contracts."

(b) Each DOT financial assistance agreement shall include the following: "If as a condition of assistance the recipient has submitted and the Department has approved a minority business enterprise affirmative action program which the recipient agrees to carry out, this program is incorporated into this financial assistance agreement by reference. This program shall be treated as a legal obligation and failure to carry out its terms shall be treated as a violation of this financial assistance agreement. Upon notification to the recipient of its failure to carry out the approved program the Department shall impose such sanctions as noted in 49 CFR Part 23, Subpart E, which sanctions may include termination of the agreement or other measures that may affect the ability of the recipient to obtain future DOT financial assistance."

(c) The recipient shall advise each subrecipient, contractor, or subcontractor that failure to carry out the requirements set forth in paragraph (a) of this section shall constitute a breach of contract and, after the notification of the Department, may result in termination of the agreement or contract by the recipient or such remedy as the recipient deems appropriate.

(d) Recipients shall take action concerning lessees as follows:

(1) Recipients shall not exclude MBEs from participation in business opportunities by entering into long-term, exclusive agreements with non-MBEs for the operation of major transportation-related activities or major

activities for the provision of goods and services to the facility or to the public on the facility.

(2) Recipients required to submit affirmative action programs under § 23.41 (a)(2) or (a)(3) that have business opportunities for lessees shall submit to the Department for approval with their programs overall goals for the participation as lessees of firms owned and controlled by minorities and firms owned and controlled by women. These goals shall be for a specified period of time and shall be based on the factors listed in § 23.45(g)(5). Recipients shall review these goals at least annually, and whenever the goals expire. The review shall analyze projected versus actual MBE participation during the period covered by the review and any changes in factual circumstances affecting the selection of goals. Following each review, the recipient shall submit new overall goals to the Department for approval. Recipients that fail to meet their goals for MBE lessees shall demonstrate to the Department in writing that they made reasonable efforts to meet the goals.

(3) Except as provided in this section, recipients are not required to include lessees in their affirmative action programs. Lessees themselves are not subject to the requirements of this part, except for the obligation of § 23.7 to avoid discrimination against MBEs.

§ 23.45 Required MBE program components.

(a) *A policy statement, expressing a commitment to use MBEs in all aspects of contracting to the maximum extent feasible.* (1) The applicant's policymaking body (Board, Council, etc.) shall issue a policy statement, signed by the chairperson, which expresses its commitment to the program, outlines the various levels of responsibility and states the objectives of the program. The policy statement shall be circulated throughout the applicant's organization and to minority, female, and nonminority community and business organizations.

(b) *The designation of liaison officer, as well as such support staff as may be necessary and proper to administer the program, and a description of the authority, responsibility, and duties of the liaison officer and support staff.* (1) The Chief Executive Officer of the recipient shall designate an MBE liaison officer and adequate staff to administer the MBE program. The MBE liaison officer shall report directly to the Chief Executive Officer.

(2) The MBE liaison officer shall be responsible for developing, managing, and implementing the MBE program on a day-to-day basis; for carrying out technical assistance activities for MBEs; and for disseminating information on available business opportunities so that MBEs are provided an equitable opportunity to bid on the applicant's contracts.

(c) *Procedures to ensure that MBEs have an equitable opportunity to compete for contracts and subcontracts.* The recipient shall develop and use affirmative action techniques to facilitate MBE participation in contracting activities. These techniques include:

(1) Arranging solicitations, time for the presentation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation MBEs.

(2) Providing assistance to MBEs in overcoming barriers such as the inability to obtain bonding, financing, or technical assistance.

(3) Carrying out information and communications programs on contracting procedures and specific contracting opportunities in a timely manner, with such programs being bilingual where appropriate.

(d) *Opportunities for the use of banks owned and controlled by minorities or women.* (1) The recipient shall thoroughly investigate the full extent of services offered by banks owned and controlled by minorities or

women in its community and make the greatest feasible use of these banks.

(2) Recipients shall also encourage prime contractors to use the services of banks owned and controlled by minorities or women.

(e) *MBE directory.* (1) The recipient shall have available a directory or source list to facilitate identifying MBEs with capabilities relevant to general contracting requirements and to particular solicitations. The recipient shall make the directory available to bidders and proposers in their efforts to meet the MBE requirements. It shall specify which firms the Department, recipient, or the Small Business Administration has determined to be eligible MBEs in accordance with procedures set forth in this subpart. Recipients subject to the disadvantaged business enterprise program requirements of Subpart D of this part shall compile and update their directories annually. The directories shall include the addresses of listed firms.

(f) *Procedures to ascertain the eligibility of MBEs and joint ventures involving MBEs.* (1) To ensure that its MBE program benefits only firms owned and controlled by minorities or women, the recipient shall certify the eligibility of MBEs and joint ventures involving MBEs that are named by the competitors in accordance with this subpart. Recipients may, at their own discretion, accept certifications made by other DOT recipients.

(2) Recipients shall require their prime contractors to make good faith efforts to replace an MBE subcontractor that is unable to perform successfully with another MBE. The recipient shall approve all substitutions of subcontractors before bid opening and during contract performance, in order to ensure that the substitute firms are eligible MBEs.

(3) Recipients covered by the disadvantaged business program requirements of Subpart D of this part shall,

in determining whether a firm is an eligible disadvantaged business enterprise, take at least the following steps:

(i) Perform an on-site visit to the offices of the firm and to any job sites on which the firm is working at the time of the eligibility investigation;

(ii) Obtain the resumes or work histories of the principal owners of the firm and personally interview these individuals;

(iii) Analyze the ownership of stock in the firm, if it is a corporation;

(i) Analyze the bonding and financial capacity of the firm;

(v) Determine the work history of the firm, including contracts it has received and work it has completed;

(vi) Obtain or compile a list of equipment owned or available to the firm and the licenses of the firm and its key personnel to perform the work it seeks to do as part of the DBE program; and

(vii) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program.

(g) *Percentage goals for the dollar value of work to be awarded to MBEs.* (1) Once the recipient has reviewed proposed contracting to identify those contracting activities which have the greatest potential for MBE participation, the recipient shall set goals that are practical and related to the potential availability of MBEs in desired areas of expertise.

(2) The applicant/recipient shall establish two types of MBE goals:

(i) Overall goals for its entire MBE program, for a specified period of time (e.g. one year), or for a specific project, (e.g. the construction of a facility); and

(ii) Contract goals on each specific prime contract with subcontracting possibilities, which the bidder or proposer must meet or exceed or demonstrate that it could not meet despite its best efforts.

(3) (i) Recipients shall submit their overall goals and a description of the methodology used in establishing them with their MBE program. When the overall goals expire, new overall goals shall be set and submitted to the Department for approval. Contract goals need not be submitted in the applicant's MBE program, but the program shall contain a description of the methodology to be used in establishing them. Contract goals may require approval by the Department prior to contract solicitation.

(ii) At the time the recipient submits its overall goals to the Department for approval, the recipient shall publish a notice announcing these goals, informing the public that the goals and a description of how they were selected are available for inspection during normal business hours at the principal office of the recipient for 30 days following the date of the notice, and informing the public that the Department and the recipient will accept comments on the goals for 45 days from the date of the notice. The notice shall include addresses to which comments may be sent, and shall be published in general circulation media and available minority-focus media and trade association publications, and shall state that the comments are for informational purposes only.

(4) Recipients covered by the disadvantaged business enterprise program requirements of Subpart D of this part shall establish an overall goal and contract goal for firms owned and controlled by socially and economically disadvantaged individuals. Other recipients shall establish separate overall and contract goals for firms owned and controlled by minorities and firms owned and controlled by women, respectively.

(5) The applicant shall consider the following factors in setting overall goals:

(i) Overall goals shall be based on projection of the number and types of contracts to be awarded by the applicant and a projection of the number and types of MBEs likely to be available to compete for contracts from the recipient over the period during which the goals will be in effect.

(ii) Overall goals shall also be based on past results of the applicant's/recipient's efforts to contract with MBEs and the reasons for the high or low level of those results.

(6) The applicant/recipient shall review the overall goals at least annually. The review process shall analyze projected versus actual MBE participation during the previous year. The necessary revisions shall be made based on the analysis and submitted to the Department for approval.

(7) Goals shall be set for specific contracts based on the known availability of qualified MBEs.

(8) Recipients and contractors shall, at a minimum, seek MBEs in the same geographic area in which they seek contractors or subcontractors generally for a given solicitation. If the recipient or contractor cannot meet the goals using MBEs from this geographic area, the recipient or contractor, as part of its efforts to meet the goal, shall expand its search to a reasonable wider geographic area.

(h) *A means to ensure that competitors make good faith efforts to meet MBE contract goals.* (1) For all contracts for which contract goals have been established, the recipient shall, in the solicitation, inform competitors that the apparent successful competitor will be required to submit MBE participation information to the recipient and that the award of the contract will be conditioned upon satisfaction of the requirements established by the recipient pursuant to this subsection.

(i) The apparent successful competitor's submission shall include the following information:

(A) The names and addresses of MBE firms that will participate in the contract;

(B) A description of the work each named MBE firm will perform;

(C) The dollar amount of participation by each named MBE firm.

(ii) The recipient may select the time at which it requires MBE information to be submitted. *Provided*, that the time of submission shall be before the recipient commits itself to the performance of the contract by the apparent successful competitor.

(2) If the MBE participation submitted in response to paragraph (h)(1) of this section does not meet the MBE contract goals, the apparent successful competitor shall satisfy the recipient that the competitor has made good faith efforts to meet the goals.

(i) The recipient may prescribe other requirements of equal or greater effectiveness in lieu of good faith efforts. Any recipient choosing alternative requirements shall inform the DOT office concerned by letter of the content of the requirements it has prescribed within 30 days of the effective date of this subsection. The recipient may put these alternative requirements into effect immediately and prior DOT approval of alternative requirements is not necessary.

(ii) If the Department determines that the alternative requirements are not as or more effective than the good faith efforts provisions of this subsection, the Department may require the recipient to use the good faith efforts requirements of this subsection instead of the requirements it has prescribed.

(3) Meeting MBE contract goals, making good faith efforts as provided in paragraph (h)(2) of this section,

or meeting requirements established by recipients in lieu of good faith efforts, is a condition of receiving a DOT-assisted contract for which contract goals have been established.

(i) [Reserved]

(j) *A description of the methods by which the recipient will require subrecipients, contractors, and subcontractors to comply with applicable MBE requirements.* (1) The recipient shall include in its MBE program a description and the specific language of any preconditions to subgrants or contracts pertaining to the use of MBEs, including subcontracting programs, it awards with DOT funds in addition to those required by this section. It shall specify on what size and/or type of contracts and subgrants it includes such preconditions. The description shall contain a summary of the ways the recipient provides help to its subrecipients, contractors, and subcontractors in drafting and implementing their programs for using MBEs. The description shall also include the means by which the recipient enforces the requirements placed on subrecipients, contractors and subcontractors.

(2) Any MBE subcontracting programs required by the recipient in addition to those required by this section shall be submitted to the recipient by the apparent successful bidder/proposer. The bidders/proposers shall be advised in the solicitation that failure to submit the additional MBE subcontracting program shall make the bidder/proposer ineligible for award.

(k) *Procedures by which the applicant/recipient will implement MBE set-asides.* Where not prohibited by state or local law and determined by the recipient to be necessary to meet MBE goals, procedures to implement MBE set-asides shall be established. MBE set-asides shall be used only in cases where at least three MBEs with capabilities consistent with contract requirements exist so as to permit competition.

APPENDIX A TO § 23.45—GUIDANCE CONCERNING GOOD FAITH EFFORTS

To determine whether a competitor that has failed to meet MBE contract goals may receive the contract, the recipient must decide whether the efforts the competitor made to obtain MBE participation were "good faith efforts" to meet the goals. Efforts that are merely *pro forma* are not good faith efforts to meet the goals. Efforts to obtain MBE participation are not good faith efforts to meet the goals, even if they are sincerely motivated, if, given all relevant circumstances, they could not reasonably be expected to produce a level of MBE participation sufficient to meet the goals. In order to award a contract to a competitor that has failed to meet MBE contract goals, the recipient must determine that the competitor's efforts were those that, given all relevant circumstances, a competitor actively and aggressively seeking to meet the goals would make.

To assist recipients in making the required judgment, the Department has prepared a list of the kinds of efforts that contractors may make in obtaining MBE participation. It is not intended to be a mandatory checklist; the Department does not require recipients to insist that a contractor do any one, or any particular combination, of the things on the list. Nor is the list intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases. In determining whether a contractor has made good faith efforts, it will usually be important for a recipient to look not only at the different kinds of efforts that the contractor has made, but also the quantity and intensity of these efforts.

The Department offers the following list of kinds of efforts that recipients may consider:

(1) Whether the contractor attended any pre-solicitation or pre-bid meetings that were scheduled by the re-

cipient to inform MBEs of contracting and subcontracting opportunities;

(2) Whether the contractor advertised in general circulation, trade association, and minority-focus media concerning the subcontracting opportunities;

(3) Whether the contractor provided written notice to a reasonable number of specific MBEs that their interest in the contract was being solicited, in sufficient time to allow the MBEs to participate effectively;

(4) Whether the contractor followed up initial solicitations of interest by contracting MBEs to determine with certainty whether the MBEs were interested;

(5) Whether the contractor selected portions of the work to be performed by MBEs in order to increase the likelihood of meeting the MBE goals (including, where appropriate, breaking down contracts into economically feasible units to facilitate MBE participation);

(6) Whether the contractor provided interested MBEs with adequate information about the plans, specifications and requirements of the contract;

(7) Whether the contractor negotiated in good faith with interested MBEs, not rejecting MBEs as unqualified without sound reasons based on a thorough investigation of their capabilities;

(8) Whether the contractor made efforts to assist interested MBEs in obtaining bonding, lines of credit, or insurance required by the recipient or contractor; and

(9) Whether the contractor effectively used the services of available minority contractors' groups; local, state and Federal minority business assistance offices; and other organizations that provide assistance in the recruitment and placement of MBEs.

(Title VI of the Civil Rights Act of 1964; sec. 30 of the Airport and Airway Development Act of 1970, as

amended; sec. 905 of the Railroad Revitalization and Regulatory Reform Act of 1976; sec. 19 of the Urban Mass Transportation Act of 1964, as amended; 23 U.S.C. 324; E.O. 11625; E.O. 12138)

[45 FR 21184, Mar. 31, 1980, as amended at 46 FR 23461, Apr. 27, 1981; 52 FR 39230, Oct. 21, 1987]

§ 23.47 Counting MBE participation toward meeting MBE goals.

MBE participation shall be counted toward meeting MBE goals set in accordance with this subpart as follows:

(a) Once a firm is determined to be an eligible MBE in accordance with this subpart, the total dollar value of the contract awarded to the MBE is counted toward the applicable MBE goals.

(b) The total dollar value of a contract to an MBE owned and controlled by both minority males and non-minority females is counted toward the goals for minorities and women, respectively, in proportion to the percentage of ownership and control of each group in the business. The total dollar value of a contract with an MBE owned and controlled by minority women is counted toward either the minority goal or the goal for women, but not to both. The contractor or recipient employing the firm may choose the goal to which the contract value is applied.

(c) A recipient or contractor may count toward its MBE goals a portion of the total dollar value of a contract with a joint venture eligible under the standards of this subpart equal to the percentage of the ownership and controls of the MBE partner in the joint venture.

(d)(1) A recipient or contractor may count toward its MBE goals only expenditures to MBEs that perform a commercially useful function in the work of a con-

tract. An MBE is considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing, and supervising the work involved. To determine whether an MBE is performing a commercially useful function, the recipient or contractor shall evaluate the amount of work subcontracted, industry practices, and other relevant factors.

(2) Consistent with normal industry practices, an MBE may enter into subcontracts. If an MBE contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the MBE shall be presumed not to be performing a commercially useful function. The MBE may present evidence to rebut this presumption to the recipient. The recipient's decision on the rebuttal of this presumption is subject to review by the Department.

(e)(1) A recipient or contractor may count toward its MBE, DBE or WBE goals 60 percent of its expenditures for materials and supplies required under a contract and obtained from an MBE, DBE or WBE regular dealer, and 100 percent of such expenditures to an MBE, WBE, or DBE manufacuturer.

(2) For purposes of this section, a manufacturer is a firm that operates or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the recipient or contractor.

(3) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business. To be a regular dealer, the firm must engage in, as its principal business, and in its

own name, the purchase and sale of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock, if it owns or operates distribution equipment. Brokers and packagers shall not be regarded as manufacturers or regular dealers within the meaning of this section.

(f) A recipient or contractor may count toward its MBE, DBE, or WBE goals the following expenditures to MBE, DBE, or WBE firms that are not manufacturers or regular dealers:

(1) The fees or commissions charged for providing a *bona fide* service, such as professional, technical, consultant or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the contract, provided that the fee or commission is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(2) The fees charged for delivery of materials and supplies required on a job site (but not the cost of the materials and supplies themselves) when the hauler, trucker, or delivery service is not also the manufacturer of or a regular dealer in the materials and supplies, provided that the fee is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(3) The fees or commissions charged for providing any bonds or insurance specifically required for the performance of the contract, provided that the fee or commission is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services.

[45 FR 21184, Mar. 31, 1980, as amended at 52 FR 39230, Oct. 21, 1987]

§ 23.49 Maintenance of records and reports.

(a) In order to monitor the progress of its MBE program the applicant/recipient shall develop a recordkeeping system which will identify and assess MBE contract awards, prime contractors' progress in achieving MBE subcontract goals, and other MBE affirmative action efforts.

(b) Specifically, the applicant/recipient shall maintain records showing:

(1) Procedures which have been adopted to comply with the requirements of this part.

(2) Awards to MBEs. These awards shall be measured against projected MBE awards and/or MBE goals. To assist in this effort, the applicant shall obtain regular reports from prime contractors on their progress in meeting contractual MBE obligations.

(3) Specific efforts to identify and award contracts to MBEs.

(c) Records shall be available upon the request of an authorized officer or employee of the government.

(d)(1) The recipient shall submit reports conforming in frequency and format to existing contract reporting requirements of the applicable Departmental element. Where no such contract reporting requirements exist, MBE reports shall be submitted quarterly.

(2) These reports shall include as a minimum:

(i) The number of contracts awarded to MBEs;

(ii) A description of the general categories of contracts awarded to MBEs;

(iii) The dollar value of contracts awarded to MBEs;

(iv) The percentage of the dollar value of all contracts awarded during this period which were awarded to MBEs; and

(v) An indication of whether and the extent of which the percentage met or exceeded the goal specified in the application.

(3) The records and reports required by this section shall provide information relating to firms owned and controlled by minorities separately from information relating to firms owned and controlled by women. If the records and reports include any section 8(a) contractors that are not minorities or women, information concerning these contractors shall also be recorded and reported separately.

§ 23.51 Certification of the eligibility of minority business enterprises.

(a) To ensure that this part benefits only MBEs which are owned and controlled in both form and substance by one or more minorities or women, DOT recipients shall use Schedules A and B (reproduced at the end of this Part) to certify firms who wish to participate as MBEs in DOT under this part.

(b) Except as provided in paragraph (c) of this section, each business, including the MBE partner in a joint venture, wishing to participate as a MBE under this part in a DOT-assisted contract shall complete and submit Schedule A. Each entity wishing to participate in a joint venture MBE under this part in DOT-assisted contracts shall in addition complete and submit Schedule B. The schedule(s) shall be signed and notarized by the authorized representative of the business entity. A business seeking certification as an MBE shall submit the required schedules with its bid or proposal for transmission to the contracting agency involved.

(c) Under the following circumstances, a business seeking to participate as an MBE under this subpart need not submit schedule A or B:

(1) If a DOT recipient has established a different certification process that DOT has determined to be as or more effective than the process provided for by this section. Where such a process exists, potential MBE contractors shall submit the information required by the recipient's process.

(2) If the potential MBE contractor states in writing that it has submitted the same information to or has been certified by the DOT recipient involved, any DOT element, or another Federal agency that uses essentially the same definition and ownership and control criteria as DOT. The potential MBE contractor shall obtain the information and certification (if any) from the other agency and submit it to the recipient or cause the other agency to submit it. The recipient may rely upon such a certification. Where another agency has collected information but not made a determination concerning eligibility, the DOT recipient shall make its own determination based on the information it has obtained from the other agency.

(3) If the potential MBE contractor has been determined by the Small Business Administration to be owned and controlled by socially and economically disadvantaged individuals under section 8(a) of the Small Business Act, as amended.

§ 23.53 Eligibility standards.

(a) The following standards shall be used by recipients in determining whether a firm is owned and controlled by one or more minorities or women is and shall therefore be eligible to be certified as an MBE. Businesses aggrieved by the determination may appeal in accordance with procedures set forth in § 23.55.

(1) Bona fide minority group membership shall be established on the basis of the individual's claim that he or she is a member of a minority group and is so regarded by that particular minority community. However, the recipient is not required to accept this claim if it determines the claim to be invalid.

(2) An eligible minority business enterprise under this part shall be an independent business. The ownership and control by minorities or women shall be real, substantial, and continuing and shall go beyond the *pro forma* ownership of the firm as reflected in its ownership documents. The minority or women owners shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with their ownership interests, as demonstrated by an examination of the substance rather than form of arrangements. Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient for recognition as an MBE. In determining whether a potential MBE is an independent business, DOT recipients shall consider all relevant factors, including the date the business was established, the adequacy of its resources for the work of the contract, and the degree to which financial, equipment leasing, and other relationship with nonminority firms vary from industry practice.

(3) The minority or women owners shall also possess the power to direct or cause the direction of the management and policies of the firm and to make the day-to-day as well as major decisions on matters of management, policy, and operations. The firm shall not be subject to any formal or informal restrictions which limit the customary discretion of the minority or women owners. There shall be no restrictions through, for example, bylaw provisions, partnership agreements, or charter requirements for cumulative voting rights or otherwise that prevent the minority or women owners, without the cooperation or vote of any owner who is not a minority or woman, from making a business decision of the firm.

(4) If the owners of the firm who are not minorities or women are disproportionately responsible for the operation of the firm, then the firm is not controlled by minorities or women and shall not be considered an MBE within the meaning of this part. Where the actual management of the firm is contracted out to individuals other than the owner, those persons who have the ultimate power to hire and fire the managers can, for the purposes of this part, be considered as controlling the business.

(5) All securities which constitute ownership and/or control of a corporation for purposes of establishing it as an MBE under this part shall be held directly by minorities or women. No securities held in trust, or by any guardian for a minor, shall be considered as held by minority or women in determining the ownership or control of a corporation.

(6) The contributions of capital or expertise by the minority or women owners to acquire their interests in the firm shall be real and substantial. Examples of insufficient contributions include a promise to contribute capital, a note payable to the firm or its owners who are not socially or economically disadvantaged, or the mere participation as an employee, rather than as a manager.

(b) In addition to the above standards, DOT recipients shall give special consideration to the following circumstances in determining eligibility under this part.

(1) Newly formed firms and firms whose ownership and/or control has changed since the date of the advertisement of the contract are closely scrutinized to determine the reasons for the timing of the formation of or change in the firm.

(2) A previous and/or continuing employer-employee relationship between or among present owners is carefully reviewed to ensure that the employee-owner has

management responsibilities and capabilities discussed in this section.

(3) Any relationship between an MBE and a business which is not an MBE which has an interest in the MBE is carefully reviewed to determine if the interest of the non-MBE conflicts with the ownership and control requirements of this section.

(c) A joint venture is eligible under this part if the MBE partner of the joint venture meets the standards for an eligible MBE set forth above and the MBE partner is responsible for a clearly defined portion of the work to be performed and shares in the ownership, control, management responsibilities, risks, and profits of the joint venture.

(d) A joint venture is eligible to compete in an MBE set-aside under this part if the MBE partner of the joint venture meets the standards of an eligible MBE set forth above, and the MBE partner's share in the ownership, control, and management responsibilities, risks, and profits of the join venture is at least 51 percent and the MBE partner is responsible for a clearly defined portion of the work to be performed.

(e) A business wishing to be certified as an MBE or joint venture MBE by a DOT recipient shall cooperate with the recipient in supplying additional information which may be requested in order to make a determination.

(f) Once certified, an MBE shall update its submission annually by submitting a new Schedule A or certifying that the Schedule A on file is still accurate. At any time there is a change in ownership or control of the firm, the MBE shall submit a new schedule A.

(g) Except as provided in § 23.55, the denial of a certification by the Department or a recipient shall be final, for that contract and other contracts being let by the recipient at the time of the denial of certification.

MBEs and joint ventures denied certification may correct deficiencies in their ownership and control and apply for certification only for future contracts.

(h) Recipients shall safeguard from disclosure to unauthorized persons information that reasonably may be regarded as confidential business information, consistent with Federal, state and local law.

§ 23.55 Appeals of denials of certification as an MBE.

(a) *Filing.* Any firm which believes that it has been wrongly denied certification as an MBE or joint venture under §§ 23.51 and 23.53 by the Department or a recipient of DOT financial assistance may file an appeal in writing, signed and dated, with the Department. The appeal shall be filed no later than 180 days after the date of denial of certification. The Secretary may extend the time for filing or waive the time limit in the interest of justice, specifying in writing the reasons for so doing. Third parties who have reason to believe that another firm has been wrongly denied or granted certification as an MBE or joint venture may advise the Secretary. This information is not considered an appeal pursuant to this section.

(b) *Decision to investigate.* The Secretary ensures that a prompt investigation is made pursuant to prescribed DOT Title VI investigation procedures.

(c) *Status of certification during the investigation.* The Secretary may at his/her discretion, deny the MBE or joint venture in question eligibility to participate as an MBE DOT-assisted contracts let during the pendancy of the investigation, after providing the MBE or joint venture in question an opportunity to show cause by written statement to the Secretary why this should not occur.

(d) *Cooperation in investigation.* All parties shall cooperate fully with the investigation. Failure or refusal

to furnish requested information or other failure to cooperate is a violation of this part.

(e) *Determinations.* The Secretary makes one of the following determinations and informs the MBE or joint venture in writing of the reasons for the determination:

(1) The MBE or joint venture is certified; or

(2) The MBE or joint venture is not eligible to be certified and is denied eligibility to participate as an MBE in any direct or DOT-assisted contract until a new application for certification is approved by the recipient.

Subpart D—Implementation of Section 105(f) of the Surface Transportation Assistance Act of 1982

SOURCE: 48 FR 33442, July 21, 1983, unless otherwise noted.

§ 23.61 Purpose.

(a) The purpose of this subpart is to implement section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100-17) and section 105(f) of the Airport and Airway Safety and Capacity Expansion Act of 1987 (Pub. L. 100-223) so that, except to the extent the Secretary determines otherwise, not less than ten percent of the funds auhorized by the Act for the programs listed in § 23.63 of this subpart is expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

(b) The ten percent level of participation for disadvantaged businesses established by section 106(c) and section 105(f) will be achieved if recipients under the programs covered by this subpart set and meet overall disadvantaged business goals of at least ten percent.

[48 FR 33442, July 21, 1983, as amended at 52 FR 39230, Oct. 21, 1987; 53 FR 18286, May 23, 1988]

§ 23.62 Definitions.

The following definitions apply to this subpart. Where these definitions are inconsistent with the definitions of § 23.5 of this part, these definitions control for all other purposes under this part.

"*Act*" means the Surfact Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100-17), with respect to financial assistance programs of the FHWA and UMTA, and the Airport and Airway Safety and Capacity Expansion Act of 1987 (Pub. L. 100-223), with respect to FAA programs.

"*Disadvantaged business*" means a small business concern: (a) Which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals; and (b) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

"*Small business concern*" means a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto except that a small business concern shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has annual average gross receipts in excess of $14 million over the previous three fiscal years. The Secretary shall adjust this figure from time to time for inflation.

"*Socially and economically disadvantaged individuals*" means those individuals who are citizens of the United States (or lawfully admitted permanent residents) and who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans and any other minorities or individ-

uals found to be disadvantaged by the Small Business Administration pursuant to section 8(a) of the Small Business Act. Recipients shall make a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged. Recipients also may determine, on a case-by-case basis, that individuals who are not a member of one of the following groups are socially and economically disadvantaged.

(a) "*Black Americans*," which includes persons having origins in any of the Black racial group of Africa;

(b) "*Hispanic Americans*," which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(c) "*Native Americans*," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(d) "*Asian-Pacific Americans*," which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, and the Northern Marianas; and

(e) "*Asian-Indian Americans*," which includes persons whose origins are from India, Pakistan, and Bangladesh.

[49 FR 33442, July 21, 1983, as amended at 52 FR 39230, Oct. 21, 1987; 53 FR 18286, May 23, 1988]

§ 23.63 Applicability.

This subpart applies to all DOT financial assistance in the following categories that recipients expend in DOT-assisted contracts:

(a) Federal-aid highway funds authorized by Title I of the Act;

(b) Urban mass transportation funds authorized by Title I or III of the Act or the Urban Mass Transportation Act of 1964, as amended; and

(c) Funds authorized by Title I, II (except section 203) or III of the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424) and obligated on or after April 2, 1987.

(d) Funds authorized under section Title I of the Airport and Airway Safety and Capacity Expansion Act of 1987 (Pub. L. 100-223).

[52 FR 39231, Oct. 21, 1987, as amended at 53 FR 18286, May 23, 1988]

§ 23.64 Submission of overall goals.

(a) Each recipient of funds to which this subpart applies that is required to have an MBE program under § 23.41 of this part shall establish an overall goal for the use of disadvantaged businesses.

(b) Each recipient required to establish an overall goal shall calculate it in terms of a percentage of one of the following bases, as applicable:

(1) For recipients of Federal-aid highway funds, all such funds that the recipient will expend in DOT-assisted contracts in the forthcoming fiscal year; or

(2) For recipients of urban mass transportation or airport funds, all such funds (exclusive of funds to be expended for purchases of transit vehicles) that the recipient will expend in DOT-assisted contracts in the forthcoming fiscal year. In appropriate cases, the UMTA or FAA Administrator may permit recipients to express overall goals as a percentage of funds for a particular grant, project, or group of grants and/or projects.

(c) Each recipient of Federal-aid highway funds, urban mass transportation funds, or airport funds shall submit its overall goal to FHWA or UMTA or FAA, as

appropriate, for approval 60 days before the beginning of the Federal fiscal year to which the goal applies. An UMTA or FAA recipient calculating its overall goal as a percentage of funds for a particular grant, project, or group of grants or projects shall submit its overall goal to UMTA or FAA at a time determined by the UMTA or FAA Administrator.

(d) Recipients submitting a goal of ten percent or more shall submit the goal under the procedures set forth in § 23.45(g) of this part.

(e) If an FHWA or UMTA or FAA recipient requests approval of an overall goal of less than ten percent, the recipient shall take the following steps in addition to those set forth in § 23.45(g) of this part:

(1) Submit with its request a justification including the elements set forth in § 23.65;

(2) Ensure that the request is signed, or concurred in, by the Governor of the state (in the case of a state transportation agency), the Mayor or other elected official(s) responsible for the operation of a mass transit agency; or, with respect to an airport sponsor, the elected official, head of the board, or other official responsible for the operation of the sponsor, and

(3) Consult with minority and general contractors' associations, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged businesses and the adequacy of the recipient's efforts to increase the participation of such businesses. If it appears to the Administrator that the recipient has failed to consult with a relevant person or organization, the Administrator may direct the recipient to consult with that person or organization.

[48 FR 33442, July 21, 1983, as amended at 53 FR 18286, May 23, 1988]

§ 23.63 Content of justification.

An FHWA or UMTA or FAA recipient requesting approval of an overall goal of less than ten percent shall include information on the following points in its justification. Guidance concerning this information is found in Appendix D.

(a) The recipient's efforts to locate disadvantaged businesses;

(b) The recipient's efforts to make disadvantaged businesses aware of contracting opportunities;

(c) The recipient's initiatives to encourage and develop disadvantaged businesses;

(d) Legal or other barriers impeding the participation of disadvantaged businesses at at least a ten percent level in the recipient's DOT-assisted contracts, and the recipient's efforts to overcome or mitigate the effects of these barriers;

(e) The availability of disadvantaged businesses to work on the recipient's DOT-assisted contracts;

(f) The size and other characteristics of the minority population of the recipient's jurisdiction, and the relevance of these factors to the availability or potential availability of disadvantaged businesses to work on the recipient's DOT-assisted contracts; and

(g) A summary of the views and information concerning the availability of disadvantaged businesses and the adequacy of the recipient's efforts to increase the participation of such businesses provided by the persons and organizations consulted by the recipient under § 23.64 (f) (3).

[48 FR 33442, July 21, 1983, as amended at 53 FR 18286, May 23, 1988]

§ 23.66 Approval and disapproval of overall goals.

(a) The Administrator reviews and approves any overall goal of ten percent or more submitted by a recipient as provided in § 23.45(g) of this part.

(b) The Administrator of the concerned Departmental element approves a requested goal of less than ten percent if he or she determines, on the basis of the recipient's justification and any other information available to the Administrator, that

(1) The recipient is making all appropriate efforts to increase disadvantaged business participation in its DOT-assisted contracts to a ten percent level; and

(2) Despite the recipient's efforts, the recipient's requested goal represents a reasonable expectation for the participation of disadvantaged businesses in its DOT-assisted contracts, given the availability of disadvantaged businesses to work on these contracts.

(c) Before approving or disapproving a requested goal of less than ten percent, the Administrator provides the Director of the DOT Office of Small and Disadvantaged Business Utilization with an opportunity to review and comment on the request.

(d) If the Administrator does not approve the goal the recipient has requested, the Administrator, after consulting with the recipient, establishes an adjusted overall goal. The adjusted overall goal represents the Administrator's determination of a reasonable expectation for the participation of disadvantaged businesses in the recipients DOT-assisted contracts, and is based on the information provided by the recipient and/or other information available to the Administrator.

(e) The Administrator may condition the approval or establishment of any overall goal on any reasonable future action by the recipient.

§ 23.68 Compliance.

(a) Compliance with the requirements of this subpart is enforced through the provisions of this secton, not through the provisions of Subpart E of this part.

(b) Failure of a recipient to have an approved MBE program, including an approved overall goal, as required by § 23.64 of this subpart, is noncompliance with this subpart.

(c) If a recipient fails to meet an approved overall goal, it shall have the opportunity to explain to the Administrator of the concerned Department element why the goal could not be achieved and why meeting the goal was beyond the recipient's control.

(d) (1) If the recipient does not make such an explanation, or if the Administrator determines that the recipient's explanation does not justify the failure to meet the approved overall goal, the Administrator may direct the recipient to take appropriate remedial action. Failure to take remedial action directed by the Administrator is noncompliance with this subpart.

(2) Before the Administrator determines whether a recipient's explanation of justifies its failure to meet the approved overall goal, the Administrator gives the Director, Office of Small and Disadvantaged Business Utilization, an opportunity to review and comment on the recipient's explanation.

(e) (1) In the event of noncompliance with this subpart by a recipient of Federal-aid highway funds, the FHWA Administrator may take any action provided for in 23 CFR 1.36.

(2) In the event of noncompliance with this subpart by a recipient of funds administered by UMTA or FAA, the UMTA or FAA Administrator may take appropriate enforcement action. Such action may include the suspension or termination of Federal funds or the refusal to

approve projects, grants, or contracts until deficiencies are remedied.

[48 FR 33442, July 21, 1983; 48 FR 41163, Sept. 14, 1983, as amended at 53 FR 18286, May 23, 1988]

§ 23.69 Challenge procedure.

(a) Each recipient required to establish an overall goal under § 23.64 shall establish a challenge procedure consistent with this section to determine whether an individual presumed to be socially and economically disadvantaged as provided in § 23.62 is in fact socially and economically disadvantaged.

(b) The recipient's challenge procedure shall provide as follows:

(1) Any third party may challenge the socially and economically disadvantaged status of any individual (except an individual who has a current 8(a) certification from the Small Business Administration) presumed to be socially and economically disadvantaged if that individual is an owner of a firm certified by or seeking certification from the recipient as a disadvantaged business. The challenge shall be made in writing to the recipient.

(2) With its letter, the challenging party shall include all information available to it relevant to a determination of whether the challenged party is in fact socially and economically disadvantaged.

(3) The recipient shall determine, on the basis of the information provided by the challenging party, whether there is reason to believe that the challenged party is in fact not socially and disadvantaged.

(i) If the recipient determines that there is not reason to believe that the challenged party is not socially and economically disadvantaged, the recipient shall so inform the challenging party in writing. This terminates the proceeding.

(ii) If the recipient determines that there is reason to believe that the challenged party is not socially and eco-

nomically disadvantaged, the recipient shall begin a proceeding as provided in paragraphs (b)(4), (5), and (6) of this section.

(4) The recipient shall notify the challenged party in writing that his or her status as a socially and economically disadvantaged individual has been challenged. The notice shall identify the challenging party and summarize the grounds for the challenge. The notice shall also require the challenged party to provide to the recipient, within a reasonable time, information sufficient to permit the recipient to evaluate his or her status as a socially and economically disadvantaged individual.

(5) The recipient shall evaluate the information available to it and make a proposed determination of the social and economic disadvantage of the challenged party. The recipient shall notify both parites of this proposed determination in writing, setting forth the reasons for its proposal. The recipient shall provide an opportunity to the parties for an informal hearing, at which they can respond to this proposed determination in writing and in person.

(6) Following the informal hearing, the recipient shall make a final determination. The recipient shall inform the parties in writing of the final determination, setting forth the reasons for its decision.

(7) In making the determinations called for in paragraphs (b) (3), (5), and (6) of this section, the recipient shall use the standards set forth in Appendix C to this subpart.

(8) During the pendancy of a challenge under this section, the presumption that the challenged party is a socially and economically disadvantaged individual shall remain in effect.

(c) The final determination of the recipient under paragraphs (b)(3)(i) and (b)(6) may be appealed to the Department by the adversely affected party to the proceeding under the procedures of § 23.55 of this part.

APPENDIX A—SECTION-BY-SECTION ANALYSIS

This section-by-section analysis describes the provisions of the final rule. This material is normally published in the preamble to the final rule. However, the Department believes that it may be useful to recipients, contractors, and the public to publish this information in an appendix to the final regulation. As a result, this information will be available to users of the Code of Federal Regulations as well as to persons who have access to the FEDERAL REGISTER print of the regulation.

Section 23.61 Purpose.

This section states that the purpose of Subpart D is to implement section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 and section 105(f) of the Airport and Airway Safety and Capacity Expansion Act of 1987. The rest of the section restates the text of the statute and states that the ten percent level of disadvantaged business participation established by the statute will be achieved if recipients set and meet goals of at least ten percent. The Department of Transportation is committed to carrying out section 106(c) and section 105(f) and achieving its objectives, and intends to enforce the obligations of the recipients and contractors under section 106(c) and section 105(f) and 49 CFR Part 23.

Section 23.62 Definitions.

As used in Subpart D, the word "Act" means the Surface Transportation and Uniform Relocation Assistance Act of 1987 Airport and Airway Safety and Capacity Expansion Act of 1987. The definition of the term "disadvantaged business" in Subpart D is very similar to the definition of the term "minority business enterprise" used for other purpoes in 49 CFR Part 23. A different term is employed in recognition of the fact that a slightly dif-

ferent set of individuals is eligible to own and control a disadvantaged business than is eligible to own and control a minority business enterprise. In either case, at least 51 percent of the bsuiness must be owned by one or more of the eligible individuals, and the firm's management and daily business operations must be controlled by one or more of the eligible individuals who own it. It is important to note that the business owners themselves must control the operations of the business. Absentee ownership, or titular ownership by an individual who does not take an active role in controlling the business, is not consistent with eligibility as a disadvantaged business under this regulation. In order to be an eligible disadvantaged business, a firm must meet the criteria of § 23.53 of this regulation and must be certified as 49 CFR Part 23 provides.

"Small business concern" is defined as a small business meeting the standards of section 3 of the Small Business Act and relevant regulations that implement it. These regulations are summarized in Appendix B to the subpart. It should be emphasized that any business which fails to qualify under the standards as a small concern, including a firm certified by SBA under the 8(a) program, cannot be certified as a disadvantaged business, even though it is owned and controlled by socially and economically disadvantaged individuals. Since the small business status of a firm can change over the years, we recommend that recipients make a point of reviewing periodically the small business status of firms with existing certifications periodically to make sure that they still qualify.

Congress determined, in order to ensure that the DBE program meets its objective of helping small minority businesses become self-sufficient and able to compete in the market with non-disadvantaged firms, that DBE firms should "graduate" from the program once their average annual receipts reached $14 million.

In implementing this provision, recipients should note that a firm is not "graduated" from the program, and hence no longer an eligible DBE, until its average annual gross receipts over the previous three-year period exceed $14 million. The fact that a firm exceeds $14 million in gross receipts in a single year does not necessarily result in "graduation." For example, suppose a firm has the following history:

1985—$11 million

1986—$13 million

1987—$14 million

1988—$14 million

1989—$15 million

The firm makes $14 million in 1987. However, the firm's average annual gross receipts for 1985-1987 are $12.67 million, so the firm remains eligible in 1988. This hypothetical firm would remain eligible in 1989 as well, since its average annual gross receipts for 1986-88 would be $13.67 million. However, the firm's average annual gross receipts for 1987-89 would be $14.3 million. As a result, the firm would not be an eligible DBE in 1990.

It should also be pointed out the $14 million ceiling, like small business size limits under section 3 of the Small Business Act, includes revenues of "affiliates" of the firm as well as the firm itself. This is the import of the "any concern or group of concerns" language. In addition, firms still are subject to applicable lower limits on business size established by the Small Business Administration in 13 CFR Part 121. For example, if SBA regulations say that $7.5 million average gross annual revenues is the size limit for a certain type of business, that size limit, rather than the overall $14 million ceiling, determines whether the firm qualifies in terms of its size to be a DBE.

"Socially and economically disadvantaged individuals" is the term that defines the persons eligible to own and control a disadvantaged business. The term includes the following people: First, anyone found to be socially and economically disadvantaged by SBA under the 8(a) program is regarded as socially and economically disadvantaged for the purpose of DOT-assisted programs. Second, any individual who is a member of one of the designated groups (Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Asian Indian-Americans or women) is rebuttably presumed to be socially and economically disadvantaged. By "rebuttably presumed," we mean that the socially and economically disadvantaged status of any individual who is a member of one of the groups is normally assumed by the recipient. With the exception of persons whose origins are from Burma and Thailand the members of these presumed groups are exactly the same persons who are considered to be minorities for purposes of the § 23.5 definition of "minority."

Indiivduals whose origins are from Burma and Thailand are not presumed to be socially and economically disadvantaged individuals for purposes of Subpart D. This means that firms owned and controlled by such individuals are eligible to be considered as MBEs for purposes of FRA, NHTSA and other DAT financial assistance programs but not as disadvantaged businesses for purposes of FHWA, UMTA and FAA programs (unless their owners are determined to be socially and economically disadvantaged on an individual basis). If SBA determines any additional groups to be presumptively socially and economically disadvantaged, these groups will become eligible for consideration as owners of disadvantaged businesses on the same basis as Black Americans, Hispanic Americans, and members of the other presumptive groups.

A recipient may, through its certification program, determine that individuals who are not members of any of the presumptive groups are socially and economically disadvantaged. On this basis, for example, disabled Vietnam veterans, Appalachian white males, Hasidic Jews, or any other individuals who are able to demonstrate to the recipient that they are socially and economically disadvantaged may be treated as eligible to own and control a disadvantaged business, on the same basis as a member of one of the presumptive groups. It must be emphasized that these individuals are not determined to be socially and economically disadvantaged on the basis of their group membership. Rather, the social and economic disadvantage of each must be determined on an individual, case-by-case basis. Guidance for making these determinations is found in Appendix C.

Section 23.63 Applicability.

This section provides that Subpart D applies to all DOT financial assistance in a number of categories that recipients expend "in DOT-assisted contracts." This last phrase is very important. The base from which goals are calculated is not the total amount of money which each recipient receives from FHWA or FAA or UMTA. It is the amount of money that the recipient expends in DOT-assisted contracts. Funds that the recipient does not expend in contracts (i.e., funds spent by an FHWA or FAA recipient to acquire right-of-way or otherwise acquire land or pay its own employees to supervise construction; funds used by an UMTA recipient to pay salaries of bus drivers) not part of the base from which the overall goal is calculated. Only those funds to be expended by the recipient in contracts are available to create contracting opportunities for disadvantaged businesses, so only these funds comprise the base from which goals for the use of disadvantaged businesses are calculated.

The first category of program funds to which Subpart D applies is Federal-aid highway funds authorized by Title I of the Act. The second category is urban mass transportation funds authorized by Title I (i.e., interstate transfer and substitution funds) or Title III of the Act. The third category is funds authorized by Title I, Title II (except section 203), or Title III of the Surface Transportation Assistance Act of 1982 which were obligated on or after April 2, 1987 (the enactment date of the STURAA). The provisions of Subpart D also apply to the FAA-administered airport funds authorized by the Airport and Airway Safety and Capacity Expansion Act of 1987.

Section 23.64 Submission of Overall Goals.

This section concerns the procedures for submission of overall goals to be used by recipients of funds covered by this subpart. Paragraph (a) is intended to avoid the imposition of new administrative burdens on recipients of relatively low amounts of DOT financial assistance. This paragraph provides that only those recipients who are required to have MBE programs under 49 CFR Part 23 must comply with the goal setting requirements of Subpart D. This includes all state transportation agencies who receive FHWA funds and UMTA recipients who receive at least $250,000 in UMTA capital and operating funds, exclusive of funds for transit vehicle purchases, or $100,000 in UMTA planning funds. Recipients of FAA airport program funds who receive planning funds in excess of $75,000 or more than $250,000 (general aviation airports), $400,000 (non-hub airports), or $500,000 (hub airports) in FAA assistance also must submit overall goals. UMTA or FAA recipients who are not required to have an MBE program by § 23.41 need not comply with the goal setting provisions of Subpart D.

Paragraph (b) describes how recipients calculate their overall goals. Recipients of FHWA funds use as the base for calculating their percentage goal all Federal-aid funds that the recipient will expend in DOT-assisted contracts in the forthcoming fiscal year. Funds authorized by section 202 of the STAA are considered to be Federal-aid highway funds for this purpose. For UMTA or FAA funds, the base is all Federal funds (exclusive of funds to be expended for transit vehicle purchases) that the recipient will expend in DOT-assisted contracts in the forthcoming fiscal year. The UMTA or FAA Administrator may, however, allow recipients to base their goals on Federal funds received for a particular grant, project, or group of grants or projects.

The Department is aware that recipients may not be aware of the exact amount of Federal funds to be received or to be used in Federally-assisted contracts in the forthcoming fiscal year. However, it is reasonable to expect that recipients will have a close enough projection so that they can determine a reasonable expectation percentage terms.

Paragraph (c) provides that with the exception of UMTA or FAA recipients calculating their goals on a grant or project basis, each UMTA, FHWA, or FAA recipient which must submit an overall goal is required to do so by the August 1 preceding the beginning of the fiscal year to which the goals apply. For example, goal submissions pertaining to fiscal year 1985 are due August 1, 1984. In the case of Fiscal Year 1984, DOT expects recipients to submit their overall goals for approval as close to August 1 as possible.

Paragraph (d) provides that, if the recipient is submitting a goal of ten percent or more, the recipient simply submits the goal under the procedures of § 23.45(g) of this part, exactly in the manner that goals have been required to be submitted under the existing regulation.

Paragraph (e) concerns the situation in which a recipient is requesting approval of an overall goal of less than ten percent. Such a recipient is required to comply with the steps set forth in § 23.45(g). However, it is required to take three additional steps. First, it must submit a justification for its request containing the information listed in § 23.65.

Second, it must ensure that the request is signed or concurred in by the Governor of the state (in the case of a state transportation agency) or the Mayor or other elected official responsible for the operation of a mass transit agency. If the official responsible for the operation of a mass transit agency or airport sponsor is not a Mayor, another appropriate elected official or officials should provide the signature or concurrence (e.g., a County Executive, the Chairman of a Board of Directors for a transit authority consisting of elected officials, etc.). The reason for this requirement is to ensure that a request for a goal of less than ten percent has the backing of the responsible elected official. This should help to prevent frivolous requests or requests based solely on the views of the non-elected staff of a state or local agency. It is also intended to protect the Department from becoming involved in a disagreement between, for example, a state transportation agency and a governor over disadvantaged business policy. It will also signal to the Department that a request for a lower goal has the backing of the highest responsible elected official involved with the jurisdiction.

The third requirement is that, before making a request for a goal of less than ten percent, the recipient must consult with minority and general contracting associations, community organizations (particularly minority community organizations) and other officials or organizations which can be expected to have information concerning the availability of disadvantaged businesses and the adequacy of recipients' efforts to increase the parti-

cipation of such businesses. This consultation need not involve a formal public comment period. However, it should involve contact between responsible official(s) of the recipient and representatives of the organizations consulted, which should also have the opportunity to provide written information.

The provision is based on the belief that the organizations consulted are likely to be in a position to give the recipient useful information concerning the availability of disadvantaged businesses and the effectiveness of and problems with the recipient's efforts to increase disadvantaged business participation. The information sought in the consultation is intended to include the views of the consulted parties on the points listed in paragraph (a)-(f) of § 23.65. Such information is important to the recipient in formulating a request for a goal of less than ten percent, the Department in evaluating such a request, and to both the recipient and the Department in attempting to determine what additional steps would be appropriate to increase disadvantaged business participation in the future.

There may be some circumstances in which a recipient will have failed to consult with a party whose information could be very useful to the formulation and evaluation of a request for a goal less than ten percent. If the Administrator becomes aware of such a case, the Administrator has the discretion to tell the recipient to go back and consult with that party. Pending this further consultation, the Administrator would not approve the request for a goal of less than ten percent.

Section 23.65 Content of Justification.

Section 23.65 lists the types of information that a recipient seeking a goal of less than ten percent must provide to the Administrator. The purpose of this information is to enable the Department to make an in-

formed determination of what the reasonable expectation for the recipient's disadvantaged business participation level is for the forthcoming fiscal year. These items of information are discussed in greater detail in Appendix D. In the absence of a justification, the FHWA, UMTA, or FAA Administrators will not be able to consider a request for a goal of less than ten percent.

Section 23.66 Approval and Disapproval of Overall Goals.

Paragraph (a) of this section concerns the situation in which a recipient submits for approval an overall goal of ten percent or more. In response to such a request, the Administrator follows the review and approval procedure provided in § 23.45(g) of the existing rule. The FHWA, UMTA, or FAA Administrators will review and approve goals submitted under this paragraph in the same manner and in accordance with the same policies as they have reviewed and approved overall goals under the existing 49 CFR Part 23.

Paragraph (b) concerns a situation in which a recipient has requested approval of a goal of less than ten percent. In order to approve the goal the recipient has requested, the Administrator must make two determinations. First, the Administrator must determine that the recipient is making all appropriate efforts to increase disadvantaged participation on its DOT-assisted contracts to at least a ten percent level. Second, the Administrator must determine that, despite the recipient's efforts, the goal requested by the recipient is the reasonable expectation, short of ten percent, for the participation of disadvantaged businesses in its DOT-assisted contracts, given the availability of disadvantaged businesses to work on these contracts.

Both of these determinations are very important. The concept of a goal as the reasonable expectation for the

recipient's performance recognizes the possibility that there may be limits, related to the availability of disadvantaged businesses, that prevent the attainment of a ten percent goal. Before granting a request for a goal below ten percent, the Administrator must determine that such a limit does in fact exist. However, the idea of a reasonable expectation also assumes that recipient is doing everything it can to increase disadvantaged business participation, both by seeking to increase the availability of disadvantaged businesses and seeking to increase the ability of available disadvantages businesses to work on its contracts. If the recipient is not taking all appropriate steps to increase disadvantaged business participation, then the goal it has requested is not its reasonable expectation for disadvantaged business participation.

If the Administrator does not approve the goal the recipient has requested, the Administrator, after consulting with the recipient, establishes an adjusted overall goal, which represents his or her determination of the reasonable expectation for recipient's disadvantaged business participation. This adjusted overall goal is on information provided by the recipient or any other information available to the Administrator from other sources, including input from interested groups and the past performance of the recipient or other recipients whose situation is analogous to that of the recipient in question. In approving either the goal requested by the recipient or in establishing an adjusted overall goal, the Administrator may always condition the approval or establishment of an overall goal on any reasonable future action by the recipient.

Section 23.67 Special Provision for Transit Vehicle Manufacturers.

This section addresses the special situation of the purchase of transit vehicles by UMTA recipients. The intent of this section is to provide a simplified method

by which transit vehicle manufacturers and UMTA recipients can meet disadvantaged business obligations. The Department does not directly regulate transit vehicle manufacturers, since they are not the recipients of Federal financial assistance from UMTA. Rather, they are contractors to UMTA recipients. Consequently, paragraph (a) imposes the basic obligation of this section on UMTA recipients themselves.

Paragraph (a) is a requirement that UMTA recipients condition the authority of manufacturers to bid on UMTA-assisted transit vehicle procurements on a certification by the manufacturer that it has complied with the other provisions of this section. In order to permit manufacturers reasonable start-up time, and to avoid disruption of the whole procurement process, this requirement does not go into effect until October 1, 1983.

Paragraph (b) requires that, in order to make this certification, manufacturers have UMTA-approved overall goal. The base for calculating these goals is the amount of UMTA financial assistance participating in transit vehicle contracts to be performed by the manufacturer during the fiscal year in question. The Department is aware that UMTA recipients order some vehicles from foreign manufacturers and that the vehicles produced by domestic manufacturers use foreign components in some cases. The Department's regulation does not, of course, have extraterritorial application. Consequently, the manufacturer may exclude from the base from which the goal is calculated the value of the work performed abroad. For example, suppose an UMTA recipient buys a bus from a Canadian manufacturer for $100,000. Fifty percent of the work on the bus is performed in Canada. In this case, the amount of funds contributing toward the base from which the manufacturer's goal is calculated is $40,000 (i.e., eighty percent of the $50,000 of the value of the bus attributable to work performed in the United States).

In submitting an overall goal for the UMTA Administrator's approval, the manufacturer is required to follow the same procedures as recipients with respect to timing, justification of goals, etc. The Administrator follows the same criteria and has the same authority with respect to approval and conditioning of recipient's overall goals as he or she does with respect to recipient's goals. The UMTA Administrator may issue additional guidance with respect to procedures for the submission of overall goals and the content or justification of overall goals that take into account special circumstances of transit vehicle manufacturers, if this appears appropriate.

Paragraph (c) provides that the manufacturer may make the certification to recipients required by paragraph (a) if it has submitted the goals provided for by this section and the UMTA Administrator has either approved them or not disapproved them. This provision is intended to prevent delays in transit vehicle procurements.

Section 23.68 Compliance.

Paragraph (a) points out that compliance with Subpart D, as distinguished from compliance with other portions of the regulation, is enforced through § 23.68 rather than through Subpart E of the regulation. For example, a recipient's failure to have an approval goal as required by Subpart D would be treated under § 23.68. A complaint of discrimination against a recipient by a particular disadvantaged business would be handled under the procedures of Subpart E. Paragraphs (b) and (d)(1) list the three circumstances in which a recipient may find itself in noncompliance with Subpart D. These are the only three circumstances in which a recipient may be found in noncompliance with Subpart D. While a recipient may be in noncompliance with 49 CFR Part 23 for other reasons, these other types of noncompliance are handled through the procedures of Subpart E.

Paragraph (b) names the first two situations in which a recipient may be found in noncompliance with Subpart D. First, the recipient can be in noncompliance by failing to have an approved overall goal as required by § 23.64. This includes not only the situation in which the recipient does not submit a goal to the Department for approval, but also situations in which a recipient does not accept an adjusted overall goal established by the Administrator or fails or refuses to carry out conditions established by the Administrator under § 23.66(e).

Second, a recipient may be in noncompliance if it does not have an approved disadvantaged business program. Subpart D does not, in itself, require the creation of such a program. However, such a program, as prescribed by other provisions of 49 CFR Part 23, is essential if a recipient is to comply with the disadvantaged business participation requirements of Subpart D. Consequently, the failure to have a program, or failure to have a program which fully meets the requirements of 49 CFR Part 23, is noncompliance with Subpart D.

For example, 49 CFR Part 23 requires that, before a recipient awards a contract, it ensure that the apparent successful bidder has met the contract goal or has demonstrated good faith efforts to do so. If a recipient's program does not provide for making this determination before the award of contract, but instead provides for checking the disadvantaged business participation efforts of the contractor only after the award of the contract, the recipient has a program that does not conform to 49 CFR Part 23. The recipient may therefore be found in noncompliance with Subpart D.

Paragraphs (c) and (d)(1) concern the procedure that recipients and the Department must follow when a recipient is falling or has fallen short of its approved overall goal. The goal-setting process is intended to determine, in advance, the reasonable expectation for the recipient's disadvantaged business participation. These

paragraphs are intended to provide for the situation in which the recipient's performance does not meet this expectation. At any time the Administrator requests it, or at the recipient's own initiative, the recipient would make an explanation to the Administrator concerning why the goal could not be achieved. This explanation, if it is to be satisfactory to the Administrator, must demonstrate that recipient's failure to meet the goal is for reasons beyond the recipient's control.

For example, if the recipient expected substantial disadvantaged business participation in a major project, and the project was postponed by litigation or a natural disaster, the recipient could make a case that its failure to meet the goal was attributable to factors beyond its control. A situation that might arise more frequently concerns the failure of contracts to meet contract goals. Under the Department's regulation, recipients may award contracts to contractors who do not meet contract goals if these contractors demonstrate to the recipient that they have made good faith efforts to do so. It is conceivable that a recipient would have set contract goals commensurate with its overall goal, would have given appropriate scrutiny to the claims of contractors that they made unsuccessful but good faith efforts to meet these contract goals, and awarded contracts to contractors who did not meet contract goals in a number of instances. Collectively, these contract awards would cause the recipient to fall below its overall goal.

The Administrator may take circumstances of this kind into account in determining whether a recipient's failure to meet its overall goal was because of factors beyond the recipient's control. In doing so, however, the Administrator also would consider the degree of scrutiny by the recipients of contractors' claims of unsuccessful good faith efforts and the efforts the recipient made in order to make up for shortfalls in particular contracts and prevent such shortfalls in other contracts.

If the recipient's explanation that factors beyond its control prevented achievement of the overall goal is determined by the Administrator to justify the failure to reach the goal, the matter is closed. If the recipient does not provide an explanation or if the Administrator determines that the recipient's explanation is not adequate, the Administrator may take the additional step of directing the recipient to take appropriate remedial action. Remedial action includes prospective steps to improve disadvantaged business participation, such as additional outreach, assistance to disadvantaged businesses or, where not inconsistent with state or local law, the use of set-asides. In order to take the remedial steps which the Administrator prescribes, the recipient may have to devote additional resources to the task.

Failure or refusal by the recipient to take these remedial steps is the third form of noncompliance with Subpart D. The Department wants to make it very clear that failure to meet an overall goal, as such, does not constitute noncompliance with Subpart D. However, if the recipient fails to meet the goal, does not satisfactorily explain its failure to meet the goal as being beyond its control, and then fails or refuses to take remedial steps prescribed by the Administrator, it would be in noncompliance.

Paragraph (e) sets forth the sources of sanctions for recipient noncompliance under Subpart D. These sanctions are the same measures that are available to the FHWA, UMTA or FAA Administrator with respect to the failure of a recipient to carry out any condition of receiving Federal financial assistance.

Section 23.69 Challenge Procedure.

The proposal in the NPRM to make the presumption of social and economic disadvantage rebuttable caused some confusion among recipients who commented. They asked whether this meant that they had to investigate the social and economic status of each business owner that sought certification for programs covered by Sub-

part D. They also asked by what criteria, and through what procedure, the rebuttable presumption would be applied.

This section is intended to answer these questions. First, the basic meaning of a presumption of social and economic disadvantage is that the recipient *assumes* that a member of the designated groups is socially and economically disadvantaged. In making certification decisions, the recipient relies on this presumption, and does not investigate the social and economic status of individuals who fall into one of the presumptive groups.

However, saying that the presumption is rebuttable means that a third party may challenge the actual social and/or economic disadvantage of a business owner who has received or is seeking certification for his firm from the recipient. The procedures for making such a challenge are spelled out in this section. They are set forth in detail in § 23.69 and are basically self-explanatory. Two points deserve emphasis. First, the procedures are intended to be informal. Recipients are not required to establish elaborate court-like tribunals, use strict rules of evidence, etc. Second, while a challenge is in progress, the presumption of social and economic disadvantage remains in effect. Therefore, if a firm has been certified, and its owner is under challenge, the firm continues to be certified and eligible to be considered a disadvantaged business for purposes of the recipient's DOT-assisted contracting activities.

Amendments to § 23.41(a)

The NPMR proposed to make technical amendments to § 23.41(a)(2)(i) and § 23.41(a)(3)(ii). These amendments added additional UMTA funding sources (e.g., Section 9A) to the list of sources from which funds would contribute toward the threshold amounts for determining whether UMTA recipients had to have MBE pro-

grams. There were no comments on these proposed changes. These amendments are adopted unchanged from the NPRM. The final rule makes similar amendments to § 23.41(a)(2)(ii) and (a)(3)(iii).

Relationship Between Subpart D and the Remainder of 49 CFR Part 23

In order to prevent uncertainty, the Department wishes to restate the relationship between Subpart D and and the remainder of 49 CFR Part 23. Under 49 CFR Part 23, certain recipients are required to have MBE programs. It is only these recipients who are required to follow the provisions of Subpart D. Recipients who must implement Subpart D do so only with respect to their FHWA and UMTA programs cited in Subpart D. For example, a state department of transportation receiving funds from FHWA, UMTA, NHTSA, FRA, and FAA would be required to follow the Subpart D goal procedures with respect only to the FHWA and UMTA funds. It would not be required to do so for its FAA, NHTSA, and FRA funds. The recipient would continue to follow all applicable procedures of 49 CFR Part 23 with respect to the FAA, FRA, and the NHTSA funds.

With respect to FHWA and UMTA-assisted programs, recipients will now set only one DBE goal, at both the overall and contract goal level. There are no longer separate DBE and WBE goals. Rather, the single DBE goal applies to all DBEs, whether they are owned and controlled by minorities or by women.

The contract award procedures of 49 CFR Part 23 apply to contracts under Subpart D just as they do to contracts under other provisions of 49 CFR Part 23. Recipients may award contracts to those successful bidders who meet contract goals or demonstrate that they made good faith efforts to do so.

Recipients must certify the eligibility of firms to participate under Subpart D programs just as they do with

respect to programs covered by other provisions of 49 CFR Part 23. For businesses owned and controlled by members of the presumptive groups listed in the definition of socially and economically disadvantaged individuals in Subpart D, the certification process is, with one exception, exactly the same as the certification process that has existed all along under 49 CFR Part 23. The exception is that individuals with origins in Burma, Thailand, and Portugal are presumed to be socially and economically disadvantaged. They can be eligible under Subpart D only if they successfully demonstrate to the recipient that they are socially and economically disadvantaged as individuals.

However, businesses owned and controlled by individuals with origins in these countries continue to be eligible minority businesses under other provisions of 49 CFR Part 23. The result is that these firms may be certified for participation in FAA, FRA, NHTSA, or other DOT-assisted programs as before, but must make an individual showing of social and economic disadvantage in order to be regarded as eligible to participate in FHWA and UMTA programs as disadvantaged businesses. The same requirement for an individual determination of social and economic disadvantage applies to any individual who is not a member of one of the presumptive groups, such as a non-minority woman, a handicapped person, etc.

Decertification Procedures

Substantial concern has been expressed about the infiltration of DOT-assisted programs by "fronts"—businesses that claim to be owned and controlled by minorities, women, or other disadvantaged individuals, but which, in fact are ineligible for participation is DOT-assisted programs as MBEs, WBEs or disadvantaged businesses.

The Department wants to take this opportunity to re-emphasize the importance of scrutiny of all firms seeking to participate in DOT-assisted programs. We believe strongly that recipients should take prompt action to ensure that only firms meeting the eligibility criteria of 49 CFR Part 23 participate as MBEs, WBEe, or disadvantaged businesses in DOT-assisted programs. This means not only that recipients should carefully check the eligibility of firms applying for certification for the first time, but also that they should review the eligibility of firms with existing certifications in order to ensure that they are still eligible. A firm's circumstances, organization, ownership or control can change over time, resulting in a once-eligible firm becoming ineligible. A second look at a firm previously found to be eligible may reveal factors leading, on renewed consideration, to a determination that it is ineligible.

49 CFR Part 23 does not, as presently drafted, prescribe any particular procedures for actions by recipients to remove the eligibility of firms that they have previously treated as eligible. When a recipient comes to believe that a firm with a current certification is not eligible, the Department recommends that the recipients take certain steps before removing the firm's eligibility. The recipient should inform the firm in writing of its concerns about the firm's eligibility, give the firm an opportunity to respond to these concerns in person and in writing, and provide the firm a written explanation of the reasons for the recipient's final decision. This process may be brief and informal. For example, the firm's opportunity to respond to the recipient's concerns need not involve a formal court-type hearing. However, in the interest of ensuring that eligibility removal decisions are made fairly, these steps should take place before a firm's eligibility is removed. The Department believes that such a procedure in so-called "decertification" cases will make the procedure fairer and better administratively, as well

as help prevent unnecessary procedural litigation. Procedures of this kind are not a regulatory requirement, but the Department believes that, as a matter of policy, that they are advisable for recipients to use.

Once a recipient has made a final decision on certification, that determination goes into effect immediately with respect to the recipient's DOT-assisted contracts (see § 23.53(g)). If a firm that has been denied certification or has been decertified appeals the recipient's action to the Department under § 23.55, or if a third party challenges the recipient's decision to certify the firm under § 23.55, the recipient's action remains in effect until and unless the Department makes a determination under § 23.55 reversing the recipient's action. The recipient's action is not stayed during the pendancy of a § 23.55 appeal.

For example, if a recipient has decertified a firm and the firm appeals the decertification to DOT, the firm remains ineligible for consideration as a disadvantaged business with respect to the recipient's DOT-assisted programs until and unless the Department finds that the firm is eligible. Likewise, if the recipient has certified the firm as eligible, the firm remains eligible while the Department's consideration of a third party's challenge to its eligibility is pending. The Department has followed this policy and interpretation of its regulations consistently under the existing rule, and we will continue to do so with respect to Subpart D.

There is only one exception to this rule. Section 23.55(c) provides that, in appropriate cases, the Secretary may deny the firm in question eligibility to participate as an MBE (or disadvantaged business) on DOT-assisted contracts let during the pendacy of the investigation, after providing the firm an opportunity to show cause by written statement to the Secretary why this should not occur. This paragraph is intended, and has

been consistently interpreted and applied by the Department, to cover only a situation in which the recipient has decided that a firm is eligible and a third party has challenged the correctness of the recipient's determination. As a matter of policy, the Department believes that the award of contracts to ineligible firms is a very serious blow to the integrity of the Department's program. Consequently, if it appears to the Department that a challenged firm's eligibility is in serious doubt, the Department, under § 23.55(c), can administratively "enjoin" the firm's participation pending a final determination on the merits of the challenge to its certification. This provision does not, however, authorize the Department to maintain a firm's certification in effect pending the outcome of the § 23.55 Appeal, when the recipient has refused to certify or has decertified the firm.

[48 FR 33442, July 21, 1983, as amended at 52 FR 39231, Oct. 21, 1987; 53 FR 18287, May 23, 1988]

APPENDIX C—GUIDANCE FOR MAKING DETERMINATIONS OF SOCIAL AN ECONOMIC DISADVANTAGE

Before making any determination of social and economic disadvantage, the recipient should always determine whether a firm is a small business concern. If it is not, then the firm is not eligible to be considered a disadvantaged business, and no further determinations need be made.

Under the definition of "socially and economically disadvantaged individual" used in Subpart D of this part, members of the named groups (Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Asian-Indian Americans) and persons certified as socially and economically disadvantaged by the Small Business Administration (SBA) under the SBA's section 8(a) program are presumed to be both socially and economically disadvantaged. This presumption is rebuttable.

This means that, as part of a challenge to the eligibility of a firm a recipient has certified under § 23.69 of this regulation, a third party may present evidence that the firm's owners are not truly socially and/or economically disadvantaged, even though they are members of one of the presumptive groups. Recipients must follow the challenge procedure in § 23.69 when a challenge is made, using this appendix for guidance in making determinations under that procedure.

Under the regulation, anyone who has been certified by SBA under its 8(a) program as socially and economically disadvantaged is automatically considered to be a socially and economically disadvantaged individual for purposes of this regulation. However, the absence of an 8(a) certification does not mean that an individual or firm is ineligible under this regulation.

Recipients should continue the existing practice of making their own judgments about whether an individual is in fact a member of one of the presumptive groups. If an individual has not maintained identification with the group to the extent that he or she is commonly recognized as a group member, it is unlikely that he or she will in fact have suffered the social disadvantage which members of the group are presumed to have experiences. If an individual has not held himself or herself out to be a member of one of the groups, has not acted as a member of a community of disadvantaged persons, and would not be identified by persons in the population at large as belonging to the disadvantaged group, the individual should be required to demonstrate social disadvantage on an individual basis.

For example, an individual could demonstrate that he had a Chinese ancestor. However, this hypothetical person has never lived in a Chinese-American community, has held himself out to be white for driver's license or other official records purposes, has not previously claimed

to be a Chinese-American, and would not be perceived by others in either the Chinese-American community or non-minority community to be a Chinese-American (or any other sort of Asian-Pacific American) by virtue of his appearance, culture, language or associations. The recipient should not regard this individual as an Asian-Pacific American.

Individuals who are not presumed to be socially and economically disadvantaged by virtue of membership in one of these groups may, nevertheless, be found to be socially and economically disadvantaged on a case-by-case basis. If an individual requests that his or her business be certified as an eligible disadvantaged business under Subpart D, the recipient, as part of its certification process, is responsible for making a determination of social and economic disadvantage.

In making determinations of social and economic disadvantage, recipients should be guided by the following standards, which have been adopted from materials prepared by the SBA.

A. SOCIAL DISADVANTAGE

(1) *Elements of Social Disadvantage.* In order to determine that an individual is socially disadvantaged, the recipient must conclude that the individual meets the following standards:

(i) The individual's social disadvantage must stem from his or her color; national origin; gender; physical handicap; long-term residenct in an environment isolated from the mainstream of American society; or other similar cause beyond the individual's control. The individual cannot establish social disadvantage on the basis of factors which are common to small business persons who are not socially disadvantaged. For example, because of their marginal financial status, many small businesses have difficulty obtaining credit through normal banking chan-

nels. An individual predicating a social disadvantage claim on denial of bank credit to his or her firm would have to establish that the denial was based on one or more of the listed causes, or similar causes—not simply on the individual's or the firm's marginal financial status.

(ii) The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged. This can be achieved, for example, by describing specific instances of discrimination which the individual has experienced, or by recounting in some detail how his or her development in the business world has been thwarted by one or more of the listed causes or similar causes. As a general rule, the more specific an explanation of how one has personally suffered social disadvantage, the more persuasive it will be. In assessing such facts, the recipient should place substantial weight on prior administrative or judicial findings of discrimination experienced by the individual. Such findings, however, are not necessarily conclusive evidence of an individual's social disadvantage; nor are they a prerequisite for establishing social disadvantage.

(iii) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries.

(iv) The individual's social disadvantage must be chronic, longstanding, and substantial, not fleeting or insignificant. Typically, a number of incidents illustrating a person's social disadvantage, occurring over a substantial period of time, would be necessary to make a successful claim. Usually, only by demonstrating a series of obstacles which have impeded one's progress in the business world can an individual demonstrate chronic, longstanding, and substantial social disadvantage.

(v) The individual's social disadvantage must have negatively affected his or her entry into, and/or advancement in, the business world.

The closer the individual can link social disadvantage to impairment of business opportunities, the stronger the case. For example, the recipient should place little weight on annoying incidents experienced by an individual which have had little or no impact on the person's career or business development. On the other hand, the recipient should place greater weight on concrete occurrences which have tangibly disadvantaged an individual in the business world.

(2) *Evidence of Social Disadvantage.* The recipient should entertain any relevant evidence in support of an individual's claim of social disadvantage. In addition to a personal statement from the individual claiming to be socially disadvantaged, such evidence may include, but is not limited to: third party statements; copies of administrative or judicial findings of discrimination; and other documentation in support of matters discussed in the personal statement. The recipient should particularly consider and place emphasis on the following experiences of the individual, where relevant: education, employment, and business history. However, the individual may present evidence relating to other matters as well. Moreover, the attainment of a quality education or job should not absolutely disqualify the individual from being found socially disadvantaged if sufficient other evidence of social disadvantage is presented the recipient.

(i) *Education.* The recipient should consider, as evidence of an individual's social disadvantage, denial of equal access to business or professional schools; denial of equal access to curricula; exclusion from social and professional association with students and teachers; denial of educational honors; social patterns or pressures which have discouraged the individual from pursuing a professional or business education; and other similar factors.

(ii) *Employment.* The recipient should consider, as evidence of an individual's social disadvantage: discrimination in hiring; discrimination in promotions and other aspects of professional advancement; discrimination in pay and fringe benefits; discrimination in other terms and conditions of employment; retaliatory behavior by an employer; social patterns or pressures which have channelled the individual into non-professional or non-business fields; and other similar factors.

(iii) *Business History.* The recipient should consider, as evidence of an individual's social disadvantage, unequal access to credit or capital; acquisition of credit under unfavorable circumstances; discrimination in receipt (award and/or bid) of government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have retarded the individual's business development.

B. Economic Disadvantage

Recipients should always make a determination of social disadvantage before proceeding to make a determination of economic disadvantage. If the recipient determnies that the individual is not socially disadvantaged, it is not necessary to make the economic disadvantaged determination.

As a general rule, economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same or similar line of business and competitive market area who are not socially disadvantaged. In determining the degree of diminished credit and capital opportunities of a socially disadvantaged individual, consideration will be given to both the disadvantaged individual and the applicant concern with which he or she is affiliated.

In considering the economic disadvantage of firms and owners, it is important for recipients to understand that they are making a comparative judgment about relative disadvantage. Obviously, someone who is destitute is not likely to be in any position to own a business. The test is not absolute deprivation, but rather disadvantage compared to business owners who are not socially disadvantaged individuals and firms owned by such individuals.

It is the responsibility of applicant firms and their onwers to provide information to the recipient about their economic situation when they seek eligibility as disadvantaged businesses. Recipients are encouraged to become as knowledgeable as they can about the types of businesses with which they deal, so that they can make a reasonably informed comparison between an applicant firm and other firms in the same line of business. Recipients are not required to make a detailed, point-by-point, accountant-like comparison of the businesses involved. Recipients are expected to make a basic judgment about whether the applicant firm and its socially disadvantaged owner(s) are in a more difficult economic situation than most firms (including established firms) and owners who are not socially disadvantaged.

OTHER ELIGIBILITY CONSIDERATIONS

It is very important for recipients to realize that making a determination of social and economic disadvantage, standing alone, does not mean that a firm is eligible. The recipient must also determine that the firm is 51 percent disadvantaged individuals and that these individuals control the firm. In making these latter determinations, recipients should continue to follow §§ 23.51-23.53 of Subpart C of 49 CFR Part 23.

If a firm or other party believes that any recipient's social and economic disadvantage determination is in error, the firm or party may make an administrative certification appeal to the Department as provided in 49 CFR 23.55.

APPENDIX D—JUSTIFICATION FOR REQUESTS FOR APPROVAL OF OVERALL GOALS OF LESS THAN TEN PERCENT

The purpose of a justification for a request for approval of an overall goal of less than ten percent is to explain why the goal requested by the recipient is the reasonable expectation for the participation of disadvantaged businesses in the recipient's DOT-assisted contracts. The justification has two basic elements. First, the recipient should show that it is doing as much as it can to increase disadvantaged business participation to at least a ten percent level. Second, the recipient should show that, given the availability of disadvantaged businesses, the requested goal is the reasonable expectation for the level of disadvantaged business participation that these efforts are likely to obtain.

With respect to the specific elements of the justification listed in § 23.65, the Department offers the following guidance, usually in the form of questions the answers to which will help the Department make an informed decision. It should be emphasized that this material is guidance, and is not intended to create a regulatory requirement or a mandatory list of the contents for recipient's submissions. However, it will help the Department to make expeditious and well-informed decisions if recipients provide reasonably complete and detailed information. Doing so will also facilitate suggestions by the Department on additional ways recipients can increase disadvantaged business participation.

(a) *Efforts to locate disadvantaged businesses.* What contacts has the recipient made with sources of information about disadvantaged businesses (such as minority contractors, associations, the Commerce Department's Minority Business Development Administration, DOT Office of Small and Disadvantaged Utilization (and its Program Management Centers), and other recipients' directories of disadvantaged businesses)? In what geo-

graphic areas has it sought to locate additional disadvantaged businesses? Have these or other information sources produced additional names of disadvantaged businesses potentially available to work on the recipient's DOT-assisted contract? What follow-up was done with respect to these firms?

(b) *Efforts to make disadvantaged businesses aware of contracting opportunities.* What steps does the recipient take through publications, advertising, pre-bid conferences, direct contact, putting disadvantaged businesses in touch with firms that may bid on prime contracts, and other means to let disadvantaged businesses know about specific contracting and subcontracting opportunities as they arise? (Activity of this kind by the recipient is important because, in many cases, disadvantaged businesses may not be in a position to learn of contracting opportunities through informal communications networks available to non-disadvantaged firms.)

(c) *Initiatives to encourage and develop disadvantaged businesses.* What is the recipient doing to assist the formation and growth of disadvantaged firms, by means such as training, technical assistance, financial assistance and involvement of other sources of support (such as the FHWA Supportive Services Program and other Federal, state, or local agencies and associations)? What has the recipient done to facilitate the ability of disadvantaged businesses to perform contracts (e.g., splitting a large contract or project into smaller segments that disadvantaged businesses can more readily perform)?

(d) *Legal or other barriers to disadvantaged business participation.* What specific barriers include bonding, prequalification and licensing requirements; difficulty in obtaining financing; any state or local residency requirement or preference, or any other formal or informal limitations on the area from which disadvantaged businesses are sought; and the reluctance of some members of the

non-disadvantaged contracting community to use firms owned and controlled by socially and economically disadvantaged persons.) What is the recipient doing about the barriers it has identified? (Examples of efforts to overcome or mitigate the effect of these barriers include changes to or exceptions from state or local requirements as they affect disadvantaged businesses, technical or financial assistance to disadvantaged businesses to help them meet existing requirements, or cooperative efforts with financial institutions and non-minority contractors' associations.)

(e) *The availability of disadvantaged businesses.* How many disadvantaged businesses are available to perform work for the recipient on DOT-assisted contracts? The starting point for the recipient's information should be its directory or list of certified disadvantaged businesses. The number of firms in this directory may not give a complete picture, however. Disadvantaged firms in other jurisdictions, not currently certified by the recipient may be willing and able to work on the recipient's contracts. On the other hand, firms in the directory may have limited availability (e.g., lack of interest in the recipient's work, other commitments, limitations of the amount of work they can handle). In some cases (e.g., where a state spends a large portion of its funds on a single large portion of its funds on a single large project requiring very specialized contractors), the availability of work that disadvantaged firms can perform could be a limitation. The recipient, as appropriate, should discuss these factors as they affect a determination of the reasonable expectation for disadvantaged business participation in its DOT-assisted contracts.

The recipient should not only advise the Department how many disadvantaged firms exist, but also analyze the dollar volume of the recipient's work the available firms are likely to be able to perform in the fiscal year (or other period) in question.

(f) *Size and other characteristics of the recipient's jurisdiction's minority population.* What is the size of the minority population of the recipient's jurisdiction? (In some cases, not only the size but also the composition or residence pattern of the minority population may be relevant). Where relevant, what is the size of the minority population of nearby jurisdictions?

Minority population is usually not an exact index of the availability of disadvantaged businesses. In some cases, disadvantaged business participation levels for various recipients have ranged well above or below the minority population of the jurisdictions involved. In any event, recipients should tie any assertions they make on the basis of minority population to the effect they believe it has on disadvantaged business availability.

(g) *Views and information from the consultation process.* With whom has the recipient consulted and what did the consulted parties say with respect to anything in paragraph (a)-(f)? In particular, what were the views of and information provided by the disadvantaged business community concerning the availability of such firms, barriers to their participation and what is needed to overcome them, the efficacy of the recipient's efforts to increase disadvantaged business participation and what could be done to improve these efforts?

APPENDIX H

WISCONSIN STATUTES INVOLVED

84.076 Disadvantaged business demonstration and training program.

(1) DEFINITIONS. In this section:

(a) "Disadvantaged individual" means a minority group member, a woman or any other individual found to be socially and economically disadvantaged by the department as provided in 49 CFR 23.62, unless successfully challenged as provided in 49 CFR 23.69.

(b) "Disadvantaged business" means a sole proprietorship, partnership, joint venture or corporation that fulfills all of the following requirements, as certified by the department:

1. It is at least 51% owned by one or more disadvantaged individuals who are U.S. citizens or persons lawfully admitted to the United States for permanent residence, as defined under 8 USC 1101(a)(20).

2. Its management and daily business operations are controlled by one or more of the disadvantaged individuals who own it.

3. It is currently performing a useful business function as defined in s. 560.036(1)(h).

(c) "Minority business" has the meaning given under s. 560.036(1)(e) 1.

(d) "Minority group member" has the meaning given under s. 560.036(1)(f).

(2) ADMINISTRATION. (a) The secretary shall administer a demonstration and training program for the purpose of developing the capability of disadvantaged businesses to participate in construction projects funded under s. 20.395(3)(bq), (bv), (bx), (cq), (cv), (cx), (dq), (dv), (dx), (fq), (fv), (fx), (hq), (hv) and

(hx). Beginning in fiscal year 1988-89, from the amounts appropriated under s. 20.395 (3) (bq), (bv), (bx), (cq), (cv), (cx), (dq), (dv), (dx), (fq), (fv), (fx), (hq), (hv) and (hx), the secretary shall allocate $4,000,000 each fiscal year for the awarding of contracts under this section. The secretary shall attempt to ensure that 75% of the amount so allocated each fiscal year is for the awarding of contracts under this section to minority businesses. The secretary may award 100% of the amount so allocated each fiscal year to one disadvantaged business.

(b) The secretary shall establish requirements for programs of preapprenticeship training and management and technical assistance designed to develop the expertise of disadvantaged individuals and disadvantaged businesses in transportation construction.

(3) BIDS, CONTRACTS. Section 84.06(2) applies to bids and contracts under this section, except that the secretary shall reject low bids that do not satisfy the requirements under sub. (4). The secretary shall establish a list of disadvantaged businesses that are eligible to submit bids for contracts awarded under this section and subcontractors who meet the requirements under sub. (4) (b). Each bid submitted under this section shall include the agreement specified under sub. (4) and all of the following conditions:

(a) A goal that at least 25% of the total number of workers in all construction trades employed on the project will be disadvantaged individuals.

(b) A subcontracting plan that provides sufficient detail to enable the secretary to determine that the prime contractor has made or will make a good faith effort to award at least 20% of the total contract amount to bona fide independent disadvantaged business subcontractors.

(4) CONTRACTOR RESPONSIBILITIES. Each contractor shall agree to do one of the following in its bid submitted under sub. (3):

(a) 1. Assure that the contractor has developed a program of preapprenticeship training that satisfies the requirements established by the secretary under sub. (2) (b) and has experience in providing the training to disadvantaged individuals; and

2. Assure that the contractor has developed and has experience in providing a program of management and technical assistance to disadvantaged business subcontractors. The management and technical assistance program shall satisfy the requirements established by the secretary under sub. (2) (b) and shall include all of the following:

a. On-site administrative support.

b. Assistance with managing scheduling, finances and property.

c. The provision of other management services necessary to assist disadvantaged businesses in developing construction capabilities and opportunities for participation in construction projects.

(b) Obtain from a subcontractor that has experience in providing training to disadvantaged individuals a program of preapprenticeship training that satisfies the requirements established by the secretary under sub. (2) (b), and assure that the subcontractor has experience in providing a program of management and technical assistance to disadvantaged business contractors, and that the subcontractor's management and technical assistance program satisfies the requirements established by the secretary under sub. (2) (b) and includes all of the requirements of par. (a) 2. A subcontractor under this paragraph need not be a disadvantaged business, but if the subcontractor is not a disadvantaged business, it may not be included within the goal established under sub. (2) (b).

(5) SUNSET. This section does not apply after June 30, 1995.